(20,433.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 468.

DRUMM-FLATO COMMISSION COMPANY, PLAINTIFF IN ERROR,

vs.

R. C. EDMISSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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a No. 1684.

DRUMM-FLATO COMMISSION COMPANY, Plaintiff in Error,
vs.
R. C. EDMISSON, Defendant in Error.

Appeal from the Supreme Court of the Territory of Oklahoma to the Supreme Court of the United States.

b THE UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

The President of the United States of America to R. C. Edmisson, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America to be holden at the City of Washington, D. C., within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Territory of Oklahoma, wherein the Drumm-Flato Commission Company is plaintiff in error and you are defendant in error, to show cause if any there be why the judgment rendered against said plaintiff in error in your favor, as in said writ of error prayed, should not be corrected and why speedy justice should not be done to the said party in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of September, in the Year of Our Lord One Thousand Nine Hundred and Six.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[Seal Supreme Court, Territory of Oklahoma.]

Attest:
BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

We hereby accept personal service of the above citation on behalf of the defendant in error, R. C. Edmisson, this First day of October, 1906.

SNODDY & SON,
CHARLES SWINDALL &
D. P. MARUM,
Attorneys for R. C. Edmisson, Defendant in Error in said Cause.

c [Endorsed:] 1684 Drumm-Flato Commission Co., Pl'ff in Error, *vs.* R. C. Edmisson, Def't in Error. Citation. Filed Oct. 4, 1906. Benj. F. Hegler, Clerk Supreme Court. By —— —— Deputy.

1 In the Supreme Court of the United States.

DRUMM-FLATO COMMISSION COMPANY, Plaintiff in Error,
vs.
R. C. EDMISSON, Defendant in Error.

Assignment of Errors and Petition for Writ of Error and Citation.

The plaintiff in error in this action, in connection with its petition for writ of error and as a part thereof, makes the following assignment of errors which it avers occurred in the trial and hearing of this cause, to-wit:

1. The Supreme Court of Oklahoma erred in affirming the judgment of the District Court of Woods County in this cause.

2. The Supreme Court of Oklahoma erred in refusing to reverse the judgment of said District Court in this cause.

3. The Supreme Court of Oklahoma in this cause erred in overruling the assignment and contention of said plaintiff in error, that there is not substantial evidence in the record here sufficient to support the verdict of the jury against said plaintiff in error.

4. The said Supreme Court of Oklahoma erred in holding that the books of account of the plaintiff in error were not admissible for the purpose of proving how many cattle plaintiff in error received from defendant in error after the making of the contract dated November 22, 1899.

5. The said Supreme Court of Oklahoma erred in approving the instruction given by the Court to the jury on the subject of conversion, as to the rate of interest from the date of conversion.

6. The said Supreme Court of Oklahoma erred in holding that the plaintiff in error had a fair trial in said District Court.

2 Wherefore, the plaintiff in error prays that the order and judgments herein complained of may be reversed and said plaintiff in error prays the Court to issue a writ of error and citation herein according to law.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE AND
ODUS G. YOUNG,
Attorney for Plaintiff in Error.

[Endorsed:] No. 1684. In the Supreme Court of the United States. Drumm-Flato Commission Company, Plaintiff in error, *vs.* R. C. Edmisson, Defendant in error. Assignment of Errors and Petition for Writ of Error and Citation. Filed Sep. 25, 1906. Benj. F. Hegler, Clerk Supreme Court. James S. Botsford, Buckner F. Deatherage, and Odus G. Young, Att'ys for Plaintiff in error.

3 In the Supreme Court of the United States.

No. 1684.

DRUMM-FLATO COMMISSION COMPANY, Plaintiff in Error,
vs.
R. C. EDMISSON, Defendant in Error.

STATE OF MISSOURI, *County of Jackson, ss:*

James S. Botsford, being duly sworn on his oath, says he is one of the attorneys of said plaintiff in error in the above entitled cause; that the judgment of the District Court of Woods County, Oklahoma, which has been affirmed by the judgment of the Supreme Court of the Territory of Oklahoma, was given for the sum of $7436.06, and that said judgment from the date of the rendition thereof in said District Court of Woods County, Oklahoma, carried interest at the rate of seven per cent. per annum.

And affiant further says that the amount in controversy in the above cause, exclusive of interest and costs, exceeds the sum of $8,000.00. And further affiant saith not.

JAMES S. BOTSFORD.

Sworn to and subscribed before me this 18th day of September, A. D. 1906.

My commission expires Jan. 27, 1910.

[SEAL.] GOODWIN CREASON,
Notary Public.

Endorsed on back as follows: No. 1684. Drumm-Flato Commission Co., Plaintiff in Error, *vs.* R. C. Edmisson, Defendant in error. Affidavit. Filed Sep. 25, 1906. Benj. F. Hegler, Clerk Supreme Court.

4 THE UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

The President of the United States to the Honorable Judges and Clerk of the Supreme Court of Oklahoma, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Oklahoma before you, being the highest court of law and equity of the said Territory in which a decision could be had in the suit between the Drumm-Flato Commission Company, a corporation, plaintiff in error, and R. C. Edmisson, defendant in error, wherein a judgment was rendered in said cause in favor of the said defendant in error and against the said plaintiff in error affirming a certain judgment of the District Court within and for Woods County Oklahoma Territory, and rendering judgment therein in favor of said defendant in error against the said plaintiff in error and adjudging that said plaintiff in error take nothing by its said

action all at the cost of said plaintiff in error and wherein the value of the amount in controversy between said parties in said cause, exclusive of interest and costs, as shown by the affidavit of James S. Botsford, one of the attorneys of said plaintiff in error, exceeded and exceeds the sum of Five Thousand Dollars ($5,000.00) and is of about the sum of Eight Thousand Dollars ($8,000.00) a manifest error has happened to the great damage of the said Drumm-Flato Commission Company, as by its complaint in assignment of errors herein appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the
5 record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington City, D. C., at said Supreme Court within thirty (30) days from the date hereof.

That the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, this 25th day of September in the Year of Our Lord One Thousand Nine Hundred and Six.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

The above writ of error is hereby allowed.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[Endorsed:] No. 1684. Drumm-Flato Commission Co., Plaintiff in error, *vs.* R. C. Edmisson, Defendant in error. Writ of Error. Filed Sep. 25, 1906. Benj. F. Hegler, Clerk Supreme Court.

6 In the Supreme Court of Oklahoma Territory.

DRUMM-FLATO COMMISSION COMPANY, Plaintiff in Error,
vs.
R. C. EDMISSON, Defendant in Error.

It is ordered by the undersigned Judge of said Supreme Court of Oklahoma Territory that the issue of the mandate in the above entitled cause be and the same is hereby stayed and withheld for a period of thirty days from this September 25th, 1906, so that said

plaintiff in error may perfect the issue of a writ of error and the supersedeas of the judgment in said cause.

[SEAL.] JNO. H. BURFORD,
Chief Justice of said Supreme Court.

Attest:
BENJ. F. HEGLER,
Clerk Supreme Court.

Endorsed on back as follows: No. 1684. In the Supreme Court of the Territory of Oklahoma. Drumm Flato Commission Co. Plaintiff in error, *vs.* R. C. Edmisson, Defendant in error. Order Staying Mandate. Filed Sep. 25, 1906. Benj. F. Hegler, Clerk Supreme Court.

7 In the Supreme Court of the Territory of Oklahoma.

DRUMM-FLATO COMMISSION COMPANY, Plaintiff in Error,
vs.
R. C. EDMISSON, Defendant in Error.

Supersedeas Bond of Plaintiff in Error on Writ of Error to the Supreme Court of the United States.

Know all men by these presents, That we, the Drumm-Flato Commission Company, as principal and National Surety Company as surety, are held and firmly bound unto said R. C. Edmisson, the above named defendant in error, in the sum of Twelve Thousand Five Hundred Dollars ($12,500), to be paid to the said R. C. Edmisson, his executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 19 day of Sept. 1906.

Whereas, the above named plaintiff in error, Drumm-Flato Commission Company, has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled cause of the Supreme Court of the Territory of Oklahoma.

Now, therefore, the condition of this obligation is such that if the above named Drumm-Flato Commission Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then the above obligation shall be void; otherwise the same shall remain and be in full force and virtue.

In witness whereof said parties have hereto set their names, by their respective Presidents, and caused their corporate seals to be here affixed the day and year above written.

8 [SEAL.] DRUMM-FLATO COMMISSION CO.
By A. DRUMM, *President.* [SEAL.]

Attest:
M. L. McCLURE, *Secretary.*

NATIONAL SURETY COMPANY,
By H. P. FONES, *Attorney in Fact.*

As to Surety,
C. F. M. PICKARD.

The above bond is hereby approved.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of Oklahoma.

Endorsed on back as follows: In the Supreme Court of the Territory of Oklahoma. Drumm-Flato Commission Co., Plaintiff in Error, *vs.* R. C. Edmisson, Defendant in error. Supersedeas Bond of Plaintiff in Error on Writ of Error to the Supreme Court of the United States. Botsford Deatherage & Young, Attorney- for Pl'ff in Error.

9 Whereas, the National Surety Company, a corporation duly incorporated under the laws of the State of New York, has deposited with me its charter or articles of incorporation and the statement required by Section 3 of an Act of Congress approved August 13, 1894, entitled "An Act Relative to Recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon; and has satisfied me that it has authority under its charter to do the business provided for in said Act, that it has a paid up capital of not less than $250,000 in cash or its equivalent, and that it is able to keep and perform its contracts:

Now, therefore, the said National Surety Company is hereby granted authority to do business under said Act in the said State of New York and is also granted authority to do business under said Act beyond the limits of said State in any Judicial District of the United States in which it shall first have appointed an agent conformably to the provisions of Section 2 of said Act.

[SEAL.] JOSEPH McKENNA,
Attorney General.

Department of Justice, Washington, D. C., June 18, 1897.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *Jan.* 18, 1904.

The annexed is a true copy of an original authorization to do business, issued by the Attorney General under the Act of Congress, approved August 13, 1894.

Witness my hand and the seal of the Department.

[SEAL.] O. J. FIELD,
Chief Clerk.

10 National Surety Company.

Know all men by these presents, that the National Surety Company, a New York corporation, having its principal office in the City, County and State of New York, doth hereby make, constitute and appoint H. P. Fones of Kansas City, state of Missouri, its true and lawful Attorney in Fact with full power and authority to sign execute, acknowledge and deliver in its name, place and stead, as surety, bonds, undertakings, and writings obligatory in the nature thereof, and when said bonds, undertakings and writings obligatory

are signed by the said H. P. Fones as such attorney in Fact, to bind the Company as fully and to the same extent as if the same were signed by the President of the Company, sealed with its common seal, and duly attested by its Secretary, and the said Company hereby ratifies and confirms all the acts of the said Attorneys done pursuant to the power and authority herein given.

This power of attorney is made and executed in accordance with and by authority of a certain By-Law adopted by the Board of Directors *at* the National Surety Company at a meeting duly called and held on the Sixth day of February, 1900, a certified copy of which is hereto attached.

In witness whereof, the National Surety Company has caused these presents to be signed by its 2d Vice President, and its corporate seal to be hereto affixed, duly attested by its Asst. Secretary, this 9th day of August A. D. 1906.

NATIONAL SURETY COMPANY.
[SEAL.] By BALLARD McCALL,
2d Vice President.

Attest:
GILBERT CONGDON,
Ass't Secretary.

11 STATE OF NEW YORK, *County of New York, ss:*

On this 9th day of August A. D., 1906, before me personally came Ballard McCall, to me known, who being by me duly sworn, did depose and say, that he resides in the City of New York; that he is *is* the 2d Vice President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[SEAL.] R. W. MYERS,
Notary Public No. 85 for Kings County, Certificate Filed in New York, Queens and Westchester Counties.

12 Copy of By-Law.

Be it remembered, that at a meeting of the Board of Directors of the National Surety Company, duly called and held on the Sixth Day of February, A. D., 1900, a quorum being present, the following By-law was adopted:

"Article XII. Resident officers and attorneys in fact."

"Section 1. The President, Vice-President or Second Vice President, may from time to time appoint resident vice-presidents, resident assistant secretaries and attorneys in fact to represent and act for and on behalf of the company, and either the President, Vice President, Second Vice President, the Board of Directors or the Executive Committee may at any time remove any such resident vice-presidents,

resident assistant secretary or attorney in fact and revoke the power and authority given him."

"Section 4. Attorneys in Fact. Attorneys in fact may be given full power and authority to execute for and in the name and on behalf of the Company, any and all bonds, recognizances, contracts of indemnity and other writing obligatory in the nature of a bond, recognizance or conditional undertaking; and any such instrument executed by any such attorney in fact shall be as binding upon the Company as if signed by the President and sealed and attested by the Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, Gilbert Congdon, Ass't secretary of the National Surety Company do hereby certify that the above and foregoing is a full, true and correct copy of Sections 1 and 4 of a By-Law adopted by the Board of Directors of said Company, at a meeting held on the Sixth day of February, A. D. 1900, and now in force, as the same appears upon the records of the Company now in my possession and custody as Ass't Secretary.

13 In witness whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of New York, this 9th. day of August, A. D., 1906.

[SEAL.] GILBERT CONGDON,
Ass't Secretary.

STATE OF NEW YORK, *City and County of New York, ss:*

I, Gilbert Congdon, Ass't Secretary of the National Surety Company, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said National Surety Company on the 9th day of August A. D., 190–, which is still in full force and effect.

In witness whereof, I have hereunto set my hand and affixed the seal of said company at the City of New York, this 9th day of August, A. D. 1906.

[SEAL.] GILBERT CONGDON,
Ass't Secretary.

Endorsed on back: No. 1684—In the Supreme Court of Oklahoma T. Drumm-Flato Commission Company Pl'ff in Error *vs.* R. C. Edmisson, Def't in Error. Bond on Writ of Error. Filed Sep. 25, 1906. Benj. F. Hegler, Clerk Supreme Court.

14 No. 1684.

In the Supreme Court of Oklahoma.

DRUMM-FLATO COMMISSION COMPANY, Plaintiff in Error,
vs.
R. C. EDMISSON, Defendant in Error.

Petition in Error.

And now comes plaintiff in error, Drumm-Flato Commission Company, by its attorneys, and shows to the court that this suit was originally brought by said R. C. Edmisson as plaintiff against said Drumm-Flato Com. Co. as defendant in the district court of Woods County, Oklahoma, and came on for trial in said district court and was tried on April 27, 28, 29, and 30, and May 1, 1904, before Hon. J. L. Pancoast, sole presiding Judge thereof, and said trial resulted in a verdict and judgment in favor of said Edmisson as plaintiff against said Drumm-Flato Com. Co. as defendant for the sum of $7436.06.

A case made duly prepared, signed and certified by said Judge is herewith filed and made a part of this petition in error. Said Drumm-Flato Commission Co. against whom said judgment was rendered and the plaintiff in error in this petition in error says that said district court of Woods County in the trial of said cause and in the decision thereof committed the following errors:

I.

Said district court on the trial of said cause erred in the admission, over the objection and exception of said defendant, of certain incompetent and irrelevant evidence offered by and on behalf of said plaintiff.

15 II.

Said district court on the trial of said cause erred in the exclusion of certain competent and relevant testimony offered on said trial by and on behalf of said defendant, Drumm-Flato Commission Company.

III.

Said district court on the trial of said cause erred specially in the exclusion from the consideration of the jury of the evidence offered by said Drumm-Flato Com. Co. from its sale books of the original entries therein showing the number of cattle shipped by said plaintiff to and sold by said defendant in the month of December, 1899.

IV.

Said district court erred in the giving to the jury on the trial of said cause of the instructions given by said court to said jury and in the giving of each one of said instructions.

V.

Said district court erred specially in the giving of an instruction to the jury peremptorily to award interest in the event the jury should find a verdict against defendant on the value of the cattle which the jury should find were taken and converted by the defendant from the plaintiff.

VI.

Said district court erred on the trial of said cause in not requiring the jury to answer the special question submitted by defendant, said question being No. Five.

VII.

There is no substantial evidence in the record in this cause sustaining, supporting or authorizing the verdict of the jury herein for plaintiff against said defendant.

16

VIII.

The verdict of the jury herein is the result of passion and prejudice.

IX.

The remarks of the Honorable Judge who presided at the trial of this cause during the trial thereof and in the presence of the jury concerning the evidence which was being offered or admitted for the consideration of the jury, were highly prejudicial to said defendant and deprived defendant of a fair trial, and said remarks and each of them were and are erroneous.

X.

The said district court erred in overruling the motion for new trial filed in said cause by the defendant.

Wherefore, said plaintiff in error, Drumm-Flato Commission Company prays the court to examine the record in this cause appended hereto, and to reverse and set aside the said verdict and judgment herein against said defendant as wholly unwarranted by law.

H. A. NOAH AND
BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Plaintiff in Error.

Waiver of the Issuance and Service of Summons in Error.

And now on this day comes said defendant in error, R. C. Edmisson, by his attorneys, and acknowledges having received a copy of the foregoing petition in error, and said R. C. Edmisson by his attorneys hereby waives the issue and service upon said defendant in error of a summons in error and hereby enter an appearance in said

Supreme Court of R. C. Edmisson as defendant in error in the above cause.

SNODDY & SON,
CHARLES SWINDALL &
D. P. MARUM,
Attorneys for Defendant in Error.

Filed February 24, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court.

[Endorsed:] Filed Feb. 24, 1905. Benj. F. Hegler, Clerk Supreme Court.

17 In the District Court of Woods County, Territory of Oklahoma. R. C. Edmisson, Plaintiff, *vs.* Drumm-Flato Commission Company, Defendant. No. 361. Case Made. Filed Oct. 29, 1904, E. P. Kelly, District Clerk.

18 In the District Court of Woods County, Territory of Oklahoma.

No. 361.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, Defendant.

Appearances.

For the Plaintiff: Charles Swindall, Snoddy & Son, D. P. Marum.
For the Defendant: O. G. Young, H. A. Noah.

Tried at Alva, Woods County, Oklahoma Territory, April 27, 28, 29, 30, and May 1, 1904 Before Hon. J. L. Pancoast, Sole Presiding Judge and a Jury.

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21 In the District Court of Woods County, Territory of Oklahoma.

Be it remembered, That on the seventh day of April, 1900, there was filed in the above entitled court a petition, which said petition is in words and figures as follows, to wit:

22 In the District Court of Woods County, Territory of Oklahoma.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, a Corporation; and J. R. GOBER, Defendants.

Comes now R. C. Edmisson, plaintiff herein and for his cause of action against the defendants herein, Drumm-Flato Commission Company, a corporation, and J. R. Gober, complains of the said defendants and alleges:

That the defendant herein Drumm-Flato Commission Company is a corporation duly organized and existing under the laws of the state of ——.

That heretofore, to wit, prior to the 22nd day of November, 1899, this plaintiff was indebted to defendants herein, the Drumm-Flato Commission Company, a corporation, in the amount evidenced by certain promissory notes which were secured by certain chattel mortgages.

That on the said 22nd day of November, 1899, this plaintiff and defendant, Drumm-Flato Commission Company, a corporation, entered into an agreement in writing whereby the said Drumm-Flato Commission Company agreed in writing to satisfy and discharge all indebtedness due from plaintiff herein to said defendant Drumm-Flato Commission Company upon delivery to said last named defendant of 1900 head of cattle taken as they run of the range where plaintiff had a large number of cattle running, a copy of which contract is hereto attached marked Exhibit "A" and made a part hereof.

That in pursuance of said contract plaintiff did gather and deliver to the defendant herein, the said Drumm-Flato Commission Company and with all dispatch, as soon after the 22nd day of November, 1899, as was possible, 1710 head of cattle, and immediately thereafter gathered and held in close quarters for delivery to said
23 defendant, Drumm-Flato Commission Company, 350 other head of cattle or so many thereof as was due on said contract, on the assurance from the said last mentioned defendant that said defendant would send out from Kansas City, Missouri, to receive said cattle their agent, one Jim Bryson.

That plaintiff kept said 350 head of cattle ready to deliver to said last mentioned defendant or so many thereof as was due on said contract for a period of about three weeks awaiting the arrival of said defendant or some agent or person authorized by said defendant under the terms of said contract.

That plaintiff herein is and has at all times been ready and willing to perform any and all things required of him by said contract and the terms thereof, but that on or about the — day of December, 1899, the defendant James R. Gober, agent and employee, and as such agent and employee, and by direction of and with the knowledge of defendant Drumm-Flato Commission Company, and said Drumm-Flato Commission Company, and in the absence of plaintiff, and without the knowledge or consent of this plaintiff, went into the pasture of this plaintiff and wrongfully and unlawfully, secretly and clandestinely took possession of and drove away all of the plaintiff's cattle in said pasture amounting to 400 head, and have ever since wrongfully and unlawfully retained such possession and have wrongfully and unlawfully and by means of intimidation and threats prevented this plaintiff from taking possession of any of said 400 head of cattle or any other cattle owned by plaintiff on said range.

That afterwards at different times the said defendants, James R. Gober, personally and as agent of the said Drumm-Flato Commission Company, and at the direction and with the knowl-
24 edge and consent of the said Drumm-Flato Commission Company, have wrongfully, unlawfully and forcibly taken possession of the cattle of this plaintiff to the amount of about 300 head and still retain the possession of the same by means of threats, force and intimidation and that by the threats of defendant James R. Gober, agent of the said Drumm-Flato Commission Company, and acting for said company, and with their knowledge and by their authority (he, said Gober, having told plaintiff at one time when plaintiff was attempting to count said cattle "I'll fill you (meaning plaintiff) full of lead if you attempt to count those cattle") That defendants have thereby at all times since the said 22nd day of Nov. 1899, prevented pl'ff from further complying with said contract and from exercising any right of ownership or control over his cattle on said range.

That under the terms of the said contract herein and heretofore set out and described the defendant the Drumm-Flato Commission Company, was entitled to and received 1900 head of cattle beside the other cattle herein and heretofore set out and described, but that the defendants herein on the — day of December, 1899, wrongfully, unlawfully, forcibly and without right took, carried away and converted to their own use and benefit four hundred and ten head (410) of cattle, the property of this plaintiff and property that plaintiff was then and there the owner of and entitled to the possession of the value of Eight Thousand Dollars ($8000.) and to the damage of plaintiff in the sum of Eight Thousand Dollars.

That plaintiff demanded a return of said cattle.

That by reason of the said unlawful conversion of said property as hereinbefore set out and described, this plaintiff has been damaged in the sum of Eight Thousand Dollars.

25 That plaintiff herein has on the range hereinafter referred to a large number of cattle, but that by reason of the wrongful acts of the defendants hereinbefore mentioned, which said wrongful acts have been continued and are continued up to the present

time, he has been and is now prevented from ascertaining the exact number of said cattle or of obtaining the possession of the same.

That the cattle hereinbefore mentioned and referred to are fully described in two certain chattel mortgages, executed by plaintiff herein on the 9th day of December, 1898, to the Drumm-Flato Commission Company, which said mortgages are of record in the office of the register of deeds of Woods county, Oklahoma.

That the cattle hereinbefore described and referred to as having been wrongfully converted by the defendants as hereinbefore set out, together with other cattle of plaintiff, which defendants herein are preventing plaintiff from exercising his right of ownership over, are in danger of being lost, removed and materially injured by the said wrongful acts of defendants herein are hereinbefore set out.

That by reason of the facts hereinbefore alleged plaintiff has become a creditor of defendants and has an interest in the property hereinbefore described, and desires that the same be subjected to plaintiff's claim.

Wherefore plaintiff prays for judgment against the defendants herein in the sum of Eight Thousand Dollars; that a receiver be appointed to take charge of the cattle hereinbefore set out and described, and that the defendants herein and each of them, their agents, employees and servants, be enjoined and restrained from continuing the acts herein complained of, and from selling, disposing of, shipping or removing any of said cattle hereinbefore referred to and described pending this litigation, and also for costs in this behalf expended.

R. C. EDMISSON, *Plaintiff*,
By ALEXANDER AND DE GEER,
His Attorneys.

26 Personally appeared before the authority, R. C. Edmisson, who being of lawful age and duly sworn, upon his oath states that he is the plaintiff in the above entitled cause; that he has heard the foregoing petition read and is familiar with the contents thereof, and that the statements and allegations therein made are true.

R. C. EDMISSON.

Subscribed and sworn to before me this 6th day of April, 1900.

J. P. RENSHAW,
Clerk Dist. Court,
[SEAL.] By L. W. MOORE, *Deputy.*

Endorsements: 361—R. C. Edmisson *vs.* The Drumm-Flato Commission Company, a corporation, *et al.*—Filed this 7th day of April, 1900, J. P. Renshaw, Clerk District Court, By L. W. Moore, Deputy—Alexander and De Geer, Attorneys for Plaintiff.

"Exhibit A" to petition will be found on page 154 of this record—S. J. Jocelyn.

27 And thereafter and on the 9th day of November, 1900, the defendant in the above entitled cause filed its second amended answer in said action, which said second amended answer is in words and figures as follows, to wit:

In the District Court of Woods County, Territory of Oklahoma.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, a Corporation, and J. R. GOBER, Defendants.

Amended Answer.

And now at this day again come the said defendants by their attorneys and for amended answer herein to the petition in the above entitled cause of said plaintiff, said defendants deny each and every allegation, averment and matter of every kind whatsoever in said petition and in each count and paragraph therein contained, except that said Drumm-Flato Commission Company is a corporation, which defendants admit to be true.

For further answer herein defendants say that on the 19th day of December, 1898, said plaintiff, being indebted to said defendant Drumm-Flato Commission Company in the sum of $37307.92 evidenced by five promissory notes hereinafter described, executed by said plaintiff to the order of said Drumm-Flato Commission Company and payable as follows: One note for $9375.00 dated November 9th, 1898, payable May 11th, 1899, after date; one note for $7858.26, dated December 19th, 1898, payable June 19th, 1899, after date; two notes for $7000.00 each, both dated December
28 19th, 1898, and both payable June 19th, 1899, after date; one note for $6074.66, dated December 19th, 1898, payable June 19th, 1899, after date, did for the purpose of securing the payments of said notes, execute and deliver a certain chattel mortgage, signed and sealed by said plaintiff in the presence of two witnesses, a copy of which chattel mortgage is herewith filed, marked "Exhibit A" and by which chattel mortgage said plaintiff bargained, sold, assigned and transferred unto said Drumm-Flato Commission Company, its successors and assigns all the following articles of personal property situated in Woods County, Oklahoma Territory, to wit:

"All of his stock of cattle branded X 2 bar on the left hip and 2 on left jaw, comprising (3340) thirty-three hundred and forty head and consists of about the following classes and ages (1500) Fifteen hundred head of cows three years old and up (55) fifty-five head of bulls one year old and up; (33) three hundred head of 2 and 3 year old steers; (300) three hundred head one year old past steers; (95) four hundred and ninety-five one, two and three year old heifers; (700) seven hundred head of calves, mixed steers and heifers worth now $66800.00. Said cattle are now located in the mortgagor's pasture on the North Canadian River about twenty-five miles S. E.

of the town of Curtis, in Woods County, Oklahoma Territory, where the same are being fed on corn, kaffir corn, sorghum and hay."

Defendants state that said chattel mortgage was in form a chattel mortgage and contained provisions usual to such instruments, and provided among other things, that if said plaintiff should pay said notes to said Drumm-Flato Commission Company, with the interest due thereon, said chattel mortgage should be void, but that in case of the failure of said plaintiff to pay said notes or any part thereof or the interest thereon according to the tenor and effect of said notes when the same should become due and payable, then said
29 chattel mortgage should have full force and effect, and it should be lawful for said Drumm-Flato Commission Company, its successors or assigns, or its authorized agent to enter upon the premises of said plaintiff or any other place where said cattle may be and to remove and dispose of the same, without resort to law and without appraisement or notice and to sell said cattle and livestock at public auction or private sale to the person or persons who should pay the highest price for the same, and out of the avails thereof to retain the full amount of said notes, with interest thereon, according to the conditions thereon, together with all reasonable costs and expenses attending the same and commission, rendering to said plaintiff or his legal representatives the surplus money, if any there should be, anything therein to the contrary notwithstanding.

Defendants further state that said chattel mortgage was duly witnessed, acknowledged and recorded with the Register of Deeds for said Woods County, Oklahoma Territory.

That said notes so secured by said chattel mortgage are still owned and held by said Drumm-Flato Commission Company and remains wholly due and unpaid, except so far as defendants have been able to realize from that portion of said cattle which has been received by said defendants; that a large sum, to wit: the total sum of $27,140.79 still remains wholly due and unpaid on said notes, and that therefore said chattel mortgage still remains in full force and effect.

That all of the cattle received by defendants, including the cattle mentioned and in respect of which the complaint is made in plaintiff's petition herewith, were received by defendants under and by virtue of said chattel mortgage and were a part of the cattle embraced in and described by said chattel mortgage, and that said defendants were entitled to receive all of said cattle including the cattle mentioned and described in plaintiff's petition under and by virtue of the terms of said mortgage.

30 Defendants further state that the cattle mentioned in and referred to in the agreement signed by said plaintiff and said Drumm-Flato Commission Company and dated the 22nd day of November, 1899, and of which a copy is filed with plaintiff's petition herein and marked "Exhibit A," were a part of the cattle mentioned and described in said chattel mortgage to which said Drumm-Flato Commission Company already had full title by virtue of said chattel mortgage at and prior to the making of said agreement dated the 22nd day of November, 1899, that said plaintiff at and before the making of said agreement dated November 22nd, 1899, was

fully bound by virtue of said chattel mortgage to do and perform all the things which he, the said plaintiff, agreed to do and perform under and by the terms of said agreement.

The defendant admits that the cattle named in the following list were received by it at the times, as shown by said list and realized on sale the amounts as set against each item, and that same were part of the cattle covered by the mortgages herein referred to:

Aug. 22, 1899	59	head	1233.85
Sept. 19, 1899	154	"	3628.45
Oct. 19, 1899	184	"	3494.31
Oct. 20, 1899	21	"	423.56
Nov. 21, 1899	717	cattle	
	45	calves	13586.81
Dec. 7, 1899	1246	cattle	
	243	calves	19597.27
Dec. 11, 1899	67	head	896.08
July 27, 1900	93	"	2457.53
July 31, 1900	6	"	110.34
Oct. 15 and 16, 1900	16	"	377.15
	210	" sold Gober	4200.00
	3061	"	$50005.45

31 Amendment made and attached April 20th, 1901, by agreement of parties and leave of court.

That said agreement dated November 22, 1899, was made and entered into without any consideration whatever moving to said defendant Drumm-Flato Commission Company; that said plaintiff has not performed said agreement on his part by the delivery to said Drumm-Flato Commission Co. of the 1900 head of cattle mentioned therein; that said agreement remains therefore unexecuted and that by reason of the premises said original chattel mortgage remains and still is in full force, and that all the acts complained of by plaintiff in his petition herein were performed, so far as the same have been performed, by defendants, under and by virtue of said chattel mortgage.

Defendants pray the court to decree in their favor and against plaintiff endorcing and foreclosing said chattel mortgage, and decreeing that all the cattle therein described may be sold, except as far as they have been received and sold thereunder by the defendants for the payment of the balance due on said notes.

And defendants further pray the court to appoint a receiver of said cattle during the pendency of this suit to take possession of the remainder of the cattle, conveyed by said mortgage, not heretofore disposed of, so that said cattle may be subject to the jurisdiction and decree of this court on the final hearing and determination of this suit. And defendants pray for such other relief as to the court may seem meet and proper, together with the costs of this suit.

Second Count.

And for a further and second count said defendants by their attorneys say that on the 19th day of December, 1898, said plaintiff being indebted to said defendant Drumm-Flato Com. Co. in the sum of $20,367.16, evidenced by seven promissory notes hereinafter described, executed by plaintiff to the order of said Drumm-Flato Com. Co. and payable as follows: One note dated November 16, 1898, and payable six months after date, for $2187.50; one note dated November 19, 1898, payable on May 25, 1899, for $3405.60; one note dated December 19, 1898, due June 15, 1899, for $3405.60; one note dated December 19, 1898, payable June 19, 1899, for $3100.88; one note dated July 19, 1898, payable June 23, 1899, for $6125.00; one note dated December 19, 1898, payable June 26, 1899, for $3259.60; and for the purpose of securing the payment of above said notes and the renewal thereof, it executed and delivered a certain chattel mortgage signed and sealed by plaintiff in the presence of two witnesses, a copy of which chattel mortgage is herewith filed and marked "Exhibit B" and by which chattel mortgage said plaintiff bargained, sold, assigned and transferred to the said Drumm-Flato Commission Company, its successors and assigns, the following articles of personal property, situated in Woods County, Oklahoma, to wit: All of his stock of cattle comprising 2170 head, branded with one or more of the following three described brands, to wit, 55 bar, on left side, 55 on left side, J. W. on either side, worth at that time $32650.00. Said cattle consist of about the following classes, 800 head of cows, three years old and up, 200 head of two and three year old steers, 500 head of one year old steers, 520 head of one and two year old heifers and bulls, 150 head of calves mixed steers and heifers, and are located seven miles west of Weatherford, on Deer Creek, Custer County, Oklahoma Territory, which said cattle were afterwards moved to Woods County, Oklahoma Territory.

Defendants state that said chattel mortgage was in form a chattel mortgage and contained provisions usual to such instruments, and provided among other things that if said plaintiff should pay said notes to said Drumm-Flato Commission Co. with interest due thereon according to the terms therein, said chattel mortgage would be void, but in case of failure of said plaintiff to pay said notes or any part thereof, or interest thereon, according to the tenor and effect of said notes, and the same should be due and payable, then said chattel mortgage shall have full force and effect, and it should be lawful for said Drumm-Flato Commission Company, its successors or assigns, or its authorized agent to enter upon the premises of said plaintiff, or any other place where said cattle may be and remove or dispose of the same without resort to law, and without appraisement or notice and to sell said cattle and live stock at public auction or private sale to the person or persons who should pay the highest price for the same, and out of the avails thereof to retain the full amount of said notes, with interest thereon, according to the conditions therein, together with all reasonable costs and ex-

penses attending same and commissions, rendering to said plaintiff or his legal representatives, the surplus money, if any there should be, anything to the contrary notwithstanding.

Defendants further state that said chattel mortgage is duly witnessed, acknowledged and recorded with the Register of Deeds office in Woods County, Oklahoma Territory, in which said county said Edmisson resided.

Defendants further state that said notes given for the total sum of $20367.16 have never been paid by plaintiff to defendant, but that said notes so secured by said chattel mortgage, and owned and held by said Drumm-Flato Commission Co. are wholly due and unpaid, except so far as defendants have been able to realize from that portion of said cattle which has been received by said defendants; that a large sum, to wit, the total sum of $11811.94, still remains wholly due and unpaid on said notes, and that therefore said chattel mortgage still remains in full force and effect.

34 Defendants further state that some of the cattle received by defendants, including the cattle mentioned, and in respect of which the complaint is made in plaintiff's petition herein, were received by defendants under and by virtue of said chattel mortgage and were a part of the cattle embraced in and described by said chattel mortgage, and that defendants were entitled to receive all of said cattle including the cattle mentioned and described in plaintiff's petition under and by virtue of the terms of said mortgage.

Defendants further state that some of the cattle received by defendants, including the cattle mentioned and in respect of which the complaint if made in plaintiff's petition herein, were received by defendants under and by virtue of said chattel mortgage and were a part of the cattle embraced in and described by said chattel mortgage, and that defendants were entitled to receive all of said cattle including the cattle mentioned and described in plaintiff's petition under and by virtue of the terms of said mortgage.

Defendants further state that some of the cattle mentioned in and referred to in the agreement signed by said plaintiff and said Drumm-Flato Commission Company and dated the 22nd day of November, 1899, and of which a copy is filed with plaintiff's petition herein and marked "Exhibit A" were a part of the cattle mentioned and described in said chattel mortgage to which said Drumm-Flato Commission Co. already had full title by virtue of said chattel mortgage at and prior to the making of said agreement dated November 22, 1899, that at and before the making of said agreement dated November 22, 1899, plaintiff was fully bound by virtue of said chattel mortgage to do and perform all the things which he, the said plaintiff, agreed to do and perform under the terms of said agreement: that

35 said agreement dated November 22nd, 1899, was made and entered into without any consideration whatever moving to said Drumm-Flato Commission Company; that said plaintiff has not performed said agreement upon his part by the delivery to said Drumm-Flato Commission — of the 1900 head of cattle mentioned therein; that said agreement remains therefore unexecuted, and that by reason of the premises said original chattel mort-

gage remains and still is in full force and that all the acts complained of by plaintiff in his petition herein were performed so far as the same have been performed, by defendant under and by virtue of said chattel mortgage.

Defendant prays the court to decree in its favor and against plaintiff, endorcing and foreclosing said chattel mortgage, and decreeing that all the cattle therein described may be sold, except so far as they have been received and sold thereunder by the defendant for the payment of the balance due on said notes.

Defendant further prays the court to appoint a receiver for said cattle during the pendency of this suit to take possession of the remainder of the cattle conveyed by said mortgage note heretofore disposed of so that said cattle may be subject to the jurisdiction and decree of this court on the final hearing and determination of this suit, and defendants pray for such other relief as to the court may seem meet and proper, together with the costs of this cuit.

BOTSFORD, DEATHERAGE & YOUNG, AND
H. A. NOAH,
Attorneys for Defendants.

Endorsements: R. C. Edmisson, Plaintiff, *vs.* Drumm-Flato Commission Co. and J. R. Gober, Defendants—2nd Amended Answer—Filed this 9th day of Nov., 1900, J. P. Renshaw, Clerk District Court, L. M. Moore, Deputy. Refiled this 22nd day of April, 1901, J. P. Renshaw, Clerk District Court, L. M. Moore, deputy.

36 And thereafter and on the 22nd day of April, 1901, the plaintiff in the above entitled action filed his reply to defendant's amended answer; which said reply is in words and figures as follows, to wit:

TER. OF OKLA., *Woods County, ss:*

In the District Court of said County and Territory.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO LIVE STOCK COMMISSION CO., a Corporation; and JAMES R. GOBER, D'f'ts.

Reply.

Comes now the plaintiff herein and for his reply to the third amended answer and to each of the pretended defenses therein contained denies generally and specifically each, every and all the allegations therein contained except only such as are contained in the petition of plaintiff herein and heretofore filed and consistent herewith.

And replying further plaintiff alleges that the defendant Drumm-Flato Live Stock Commission Company, a corporation, or its agents,

officers and attorneys drew up the said contract of date Nov. 22nd, 1900, and represented to plaintiff that the same was for a valuable consideration and that by such representations this plaintiff was induced to execute and did execute said contract.

37 That plaintiff executed said contract in good faith and performed all the conditions on his part except as prevented from so doing by the wrongful and unlawful acts of the defendant Drumm-Flato Live Stock Commission Company and its servants and agents and employés.

That the said contract was made for the settlement and satisfaction of two different chattel mortgages for different amounts and covering two different bunches of cattle branded in two different brands.

That the mortgage set out and described in the first defense in third amended answer of defendants is one of said mortgages respecting settlement of which said contract was made and the cattle described therein were one bunch of the cattle respecting which said tract was made and that said last mentioned mortgage on the cattle therein described was *very* good security for the debt secured thereby. That the mortgage set out and described in the second defense in said third amended answer of defendants is the other mortgage respecting settlement of which said contract was made and the cattle described therein were another bunch of the cattle respecting which said contract was made and that said last mentioned mortgage on the cattle therein described was *very* poor & inadequate security for the debt secured thereby.

That by reason of and by the execution of said contract the defendant was greatly benefited in this that it secured a settlement of a debt that was poorly secured and received therefor under the terms of said contract a great number of valuable cattle.

That the plaintiff acted in good faith and did not until the filing of amended answer of defendant suspect that defendant was acting in bad faith but plaintiff now alleges that at the time of the making and executing said contract that the said defendant falsely and fraudulently misrepresented the facts to plaintiff for the purpose of inducing plaintiff to enter into said contract.

38 That the defendant the said Drumm-Flato Live Stock Commission Company received under the terms of said contract a great value and a great number of valuable cattle and induced the plaintiff to part with great value and a great number of valuable cattle and that thereby the defendant Drumm-Flato Live Stock Commission — is estopped from at this time denying the consideration of said contract and having this replied plaintiff prays judgment as in prayer of petition.

R. C. EDMISSON,
By ALEXANDER & DE GEER.

Endorsements: R. C. Edmisson, Pl'ff *vs.* Drumm-Flato etc. *et al.*, Def'ts.—Reply—Filed this 22 day of April, 1901. J. P. Renshaw, Clerk District Court. L. W. Moore, Deputy. Alex. & De Geer, Att'ys.

39 Court convened Monday, April 25th, 1904, at 9 o'clock A. M. pursuant to the order of the Supreme Court,

Present the Hon. J. L. Pancoast, sole presiding Judge D. C. Oates, Sheriff, E. P. Kelly, Clerk, S. T. Jocelyn, Stenographer, and N. W. Magruder, Crier.

Public proclamation of the opening of Court having been announced proceedings were had as follows, to wit:

361.

R. C. EDMISSON
vs.
DRUMM-FLATO COMMISSION COMPANY.

And now the trial of this cause is set for April 27th, 1904.

Court convened Wednesday, April 27th, 1904, at 10 o'clock A. M. pursuant to adjournment.

Present the Hon. J. L. Pancoast, sole presiding Judge, E. P. Kelly, Clerk, D. C. Coates, Sheriff, S. T. Jocelyn, Stenographer, and N. W. Magruder, Crier.

Public proclamation of the opening of court having been announced, proceedings were had as follows, to wit:

40 361.

R. C. EDMISSON
vs.
DRUMM-FLATO COMMISSION CO.

Comes now this cause on for hearing in its regular assignment of causes for hearing at this term of court; and the plaintiff being present in person and by his attorneys Snoddy & Son, D. P. Marum and Chas. Swindall; and the defendant by its attorneys H. A. Noah and O. G. Young; and both sides announcing ready for trial, the clerk, by order of court calls from the slips of paper drawn from the box containing the names of petit jurors at this term of court, the names of 12 jurors; and now they are by the clerk of said court, duly sworn to well and truly answer all questions touching their qualifications and competency to sit as jurors in this case; and the court offers them to counsel for examination; and counsel for plaintiff and defendant proceed to examine the jury.

And now as a juror is excused either for cause of peremptory challenge, another is called in his place and the examination is suspended until the new juror is in his place and duly sworn.

And now both sides having either waived or exhausted all right of challenge, either for cause of peremptory challenge, the following jurors are accepted to sit as a jury in this case, to wit: Park Keffer, J. H. Wyman, Jno. McNair, A. D. Rogers, O. E. Rhoades, J. P. Reams, S. N. Marlott, M. C. Custer, D. R. Creek, C. H. Clymer, J. L. Showalter and W. C. Deveraux.

And now they are by the clerk of the court duly sworn to well and truly try and a true deliverance make in this cause and a true verdict render according to the law and the evidence.

And now counsel for the plaintiff states the case to the jury.

And now the court admonishes the jury and excuses them until April 28, 1904, at 9 o'clock A. M.

And now court adjourns until April 28th, 1904, at 9 o'clock A. M.

41 Court convened Thursday, April 28th, 1904, at 9 o'clock A. M., pursuant to adjournment.

Present, the Hon. J. L. Pancoast, sole presiding Judge, E. P. Kelly, Clerk, D. C. Oates, Sheriff, S. T. Jocelyn, Stenographer, and N. W. Magruder, Crier.

Public proclamation of the opening of court having been announced proceedings were had as follows, to wit:

361.

R. C. EDMISSON
vs.
DRUMM-FLATO COMMISSION CO.

Comes now this case on for further trial; and the plaintiff being present in person and by his attorneys Snoddy and Son, Chas. Swindall and D. P. Marum; and the defendant being present by its attorneys H. A. Noah and O. G. Young; and comes the jury and all jurors being present, R. C. Edmisson and John McFadden are sworn and testify for plaintiff; and the court admonishes the jury and excuses them for ten minutes.

And now the court takes a recess for ten minutes.

361.

R. C. EDMISSON
vs.
DRUMM-FLATO COMMISSION CO.

And now this cause being resumed for trial and all parties being present; and comes the jury and all jurors being present G. Wilkerson, Eli Roberts, H. Fuller are sworn and testify for plaintiff and plaintiff reads the depositions of E. F. Black.

And now the hour of noon having arrived the court admonishes the jury and excuses them until 1:30 P. M.

And now court adjourns until 1:30 P. M.

42 Court convenes at 1:30 P. M. pursuant to adjournment.

361.

R. C. EDMISSON
vs.
DRUMM-FLATO COMMISSION CO.

Comes now this cause on for further trial; all parties being present; and comes the jury and all the jurors being present, A. S. Tolbert is sworn and R. C. Edmisson is recalled and testify for plaintiff and the plaintiff reads the deposition of Miller Holman.

And plaintiff rests.

And J. R. Gober, J. M. Barkley and J. F. Bryson are sworn and testify for defendant.

And now the court admonishes the jury and excuses them for ten minutes.

And now the court takes a recess for ten minutes.

361.

R. C. EDMISSON
vs.
DRUMM-FLATO COMMISSION CO.

And now this cause is resumed for trial; All parties being present; and comes the jury and all jurors being present, R. E. Stone is called and sworn and testifies for the defendant; and J. F. Bryson is recalled and testifies for defendant.

And the hour of adjournment having arrived the court admonishes the jury and excuses them until April 29th, 1904, at 9 o'clock A. M.

And now court adjourns until April 29th, 1904, at 9 o'clock A. M.

43 Court convened Friday, April 29th, 1904, at 9 o'clock A. M. pursuant to adjournment.

Present the Hon. J. L. Pancoast, sole presiding Judge, E. P. Kelly, Clerk, D. C. Oates, Sheriff, S. T. Jocelyn, Stenographer, and N. W. Magruder, Crier.

Public proclamation of the opening of court having been announced, proceedings were had as follows, to wit:

361.

R. C. EDMISSON
vs.
DRUMM-FLATO COMMISSION CO.

And now on this 29th day of April, 1904, this cause being resumed for trial and the plaintiff being present in person and by his

attorneys, Snoddy and Son, Chas. Swindall and D. P. Marum; and the defendant being present by its attorneys H. A. Noah and O. G. Young; and comes the jury and all jurors being present, J. F. Bryson is recalled and testifies for defendant; and counsel for the defendant reads the deposition of John L. Burnett; and the court admonishes the jury and excuses them for ten minutes.

And now the court takes a recess for ten minutes.

361.

R. C. EDMISSON
vs.
DRUMM-FLATO COMMISSION CO.

Comes now this cause on for further hearing and the plaintiff being present in person and by counsel and the defendant being present by counsel; and comes the jury and all jurors being present the counsel for defendant reads the deposition of John L. Rume; and the hour of noon having arrived the court admonishes the jury and excuses them until 1:30 P. M.

And now Court adjourns until 1:30 P. M.

44 Court convened at 1:30 P. M. pursuant to adjournment.

361.

R. C. EDMISSON
vs.
DRUMM-FLATO COMMISSION CO.

And now this cause being resumed for trial and the plaintiff being present in person and by his attorneys; and the defendant being present by counsel, and comes the jury and all jurors being present, J. H. Lampe and O. G. Young are sworn and testify for defendant. And the court admonishes the jury and excuses them for ten minutes.

And now the court takes a recess for ten minutes.

361.

R. C. EDMISSON
vs.
DRUMM-FLATO COMMISSION CO.

Comes now this cause on for further trial. And all parties being present; and comes the jury and all jurors being present, the defendant rests. And A. W. Tolbert, Eli Roberts, John Gerlach and R. C. Edmisson, are called and testify in rebuttal for plaintiff; and the hour of adjournment having arrived the court admonishes the jury and excuses them until 9 o'clock A. M. April 30th, 1904.

And now court adjourns until 9 o'clock A. M. April 30th, 1904.

45 In the District Court of Woods County, Territory of Oklahoma.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, Defendant.

Testimony.

46 In the District Court of Woods County, Territory of Oklahoma.

No. 361.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, Defendant.

WEDNESDAY, *April* 27, 1904—3:30 p. m.

By the COURT: Number 361, R. C. Edmisson *versus* Drumm-Flato Commission Company. Houston and Marum for plaintiff, and Noah and others for defendant. Are you ready, gentlemen?

By Mr. MARUM: Yes, sir.

By Mr. YOUNG: Yes, sir.

By the COURT: Call a jury.

By CLERK: M. C. Cluster, J. P. Reams, S. N. Marlett, D. R. Creek, G. H. Brewer, Park Keffer, C. H. Clymer, John Bowman, O. E. Rhodes, J. H. Wyman, John McNair, A. L. Rogers.

Jurors sworn by clerk to answer questions.

By the COURT: Proceed, gentlemen.

By Mr. SNODDY: Gentlemen, this is an action brought by R. C. Edmisson against the Drumm-Flato Commission Company of Kansas City, for damages for the wrongful conversion of about four hundred head of cattle in the month of December, I think 1899. Any of you gentlemen know anything about this case? It was tried, I think in the year 1900, or 1901; any of you gentlemen remember anything about the case, remember hearing anything about it?

None of the jurors answer.

47 A. L. ROGERS:

Q. State your name to the court and jury.
A. A. L. Rogers.
Q. Where do you reside, Mr. Rogers?
A. Waynoka.
Q. How long have you resided there?
A. Eight years.
Q. Are you acquainted with the plaintiff, R. C. Edmisson?
A. No, sir.

Q. This gentlemen here?

Counsel indicates plaintiff.

A. No, sir.
Q. Which direction do you live from Waynoka?
A. I live southeast.
Q. How far?
A. Six miles.
Q. What business are you engaged in?
A. Farming.
Q. Engaged in the cattle business in any way?
A. I have cattle, too.
Q. You have a few cattle?
A. Yes, sir.
Q. Are you acquainted with any of the defendants composing the corporation of Drumm-Flato Commission Company?
A. No, sir.
Q. Not? Are you acquainted with one J. R. Gober?
A. No, sir.
Q. Gentleman who had a ranch down in that neighborhood, somewhere near the Smith-Maxwell-Morris ranch?
A. I am not acquainted with him.
48 Q. Are you acquainted with Mr. Noah, one of the attorneys for the defense?
A. No, sir.
Q. If you were selected as a juror to sit in the trial of this case, do you know of any reason why you could not try it according to the law and the evidence, uninfluenced by anything else? No reason why you couldn't try it? Do you know of any reason why you could not?
A. No, sir.

By Mr. SNODDY: Pass the juror for cause.

Cross-examination by O. G. YOUNG:

Q. Are you acquainted with the plaintiff, R. C. Edmisson?
A. No, sir.
Q. How long have you lived down southeast of Waynoka?
A. Eight years.
Q. Are you acquainted with Colonel Snoddy or Mr. Swindall or Mr. Marum or young Mr. Snoddy?
A. No, sir.
Q. Either of them ever represent you in any legal matter?
A. No, sir.
Q. What has been your business? Farming?
A. Farming, yes, sir.
Q. Handle a few cattle?
A. Yes, sir.
Q. Ever handle cattle to any extent?
A. No, sir.
Q. About how many do you handle?
A. About sixteen head.

Q. That is about as many as you ever had?
A. Yes, sir.
Q. Ever had any dealings with a cattle commission company?
49 A. No, sir.
Q. If it developes in this case that one of the parties is a cattle commission company would you have any prejudice against them because they happened to be such a company?
A. No, sir.
Q. Have you any prejudice in your mind against a corporation?
A. No, sir.
Q. Give a corporation the same fair, candid consideration you would any other individual, would you?
A. Yes, sir.
Q. And find in their favor, if the evidence justified it?
A. Yes, sir.

By Mr. YOUNG: Pass.

JOHN H. McNAIR.

Direct examination by Mr. SNODDY:

Q. Just state your name to the court and jury, I mean state your name.
A. McNair, John H.
Q. Where do you reside, Mr. McNair?
A. Near Goltry.
Q. What part of the county is that?
A. Extreme east part of the county.
Q. Extreme east part of the county. Are you acquainted with the plaintiff in this case, R. C. Edmisson, this gentleman sitting here?

Counsel indicated plaintiff.

A. No, sir.
Q. Are you acquainted with any of the members of the corporation of the Drumm-Flato Commission Company?
A. No, sir. Don't know who are interested in it.
Q. Have you ever had any dealings with that commission company in any way?
50 A. No, sir.
Q. Or any other commission company?
A. No, sir.
Q. What business are you engaged in?
A. Farming.
Q. Do you have any stock, to any extent, I mean?
A. No, five or six head of cattle.
Q. Five or six head of cows?
A. Yes, sir.
Q. Ever ship any cattle?
A. No, sir.

Q. Are you acquainted in the neighborhood of Quinlan?
A. No, sir.
Q. This county?
A. No, sir.
Q. You never heard anything about this case until to-day?
A. Not to my present knowledge I haven't.
Q. Are you acquainted with Mr. Noah, one of the attorneys in this case?
A. Never saw him before.
Q. Acquainted with Mr. Young, one of the attorneys, the gentleman from Kansas City, sitting over here?

Counsel indicates O. G. Young.

A. No, sir.
Q. If you were selected as a juror to try this case do you know of any reason why you could not render a fair and impartial verdict, according to the law and the evidence, uninfluenced by anything else?
A. I know of none.

51 By Mr. SNODDY: Pass the juror.

Cross examination by O. G. YOUNG:

Q. Are you acquainted with the plaintiff in this case, Mr. R. C. Edmisson?
A. No, sir.
Q. Any of the attorneys on the other side ever represent you in any matter of litigation at any time?
A. No, sir.
Q. Ever been engaged in the cattle business to any extent?
A. No, sir.
Q. Ever have any business with a cattle commission company?
A. No, sir.
Q. How long have you lived in the Territory?
A. Since March the twenty-fourth, '94.
Q. 1894?
A. Yes, sir.
Q. Does there exist in your mind any prejudice against corporations?
A. No, sir.
Q. Give the evidence in favor of a corporation the same candid and fair consideration, the same as though—it were one party, individual?
A. Yes, sir.

By Mr. YOUNG: Pass.

W. H. WYMAN.

Direct examination by Mr. SNODDY:

Q. State your name.
A. J. H. Wyman.
Q. Where do you reside?
A. Dane postoffice.
Q. How far is that from Waynoka, if you know?
A. I think about twenty-five miles. I don't know. That is my impression.
52 Q. Are you acquainted in the neighborhood of Quinlan?
A. No sir.
Q. Or Moscow?
A. No sir.
Q. Are you acquainted with the plaintiff in this action R. C. Edmisson, this gentleman sitting here?

Counsel indicates plaintiff.

A. No sir.
Q. Are you acquainted with any of the members of the corporation known as the Drumm-Flato Commission Company at Kansas City?
A. No sir.
Q. Have you ever had any dealings with any commission company in Kansas City?
A. No sir.
Q. Have you with any commission company?
A. No sir.
Q. What is your business, Mr. ——?
A. Farming.
Q. Do you handle any stock?
A. Not very much, I haven't but a few cattle, fifteen or twenty head.
Q. Have you ever handled stock any?
A. Not to any great extent, no sir.
Q. You simply have a farm of a hundred and sixty acres?
A. Yes sir.
Q. And just such stock as you can——
A. As I can handle all right on the farm.
Q. That's right. Are you acquainted with Mr. Noah, one of the attorneys for the defendant?
A. No sir, I am not acquainted with him. I have saw him before.
53 Q. Ever been engaged in any litigation in which he represented you as attorney?
A. No sir.
Q. Acquainted with Mr. Young, one of the attorneys?
A. No sir.
Q. If you were—I believe you stated at the outset you had never heard anything about the case?
A. I never heard anything about it.
Q. How long have you lived in the county?

A. About nine years.
Q. Nine years. If you were selected as a juror to sit in the trial of this case, do you know of any reason why you could not render a fair and impartial verdict, according to the law and the evidence alone?
A. No sir, I know of no reason.

By Mr. SNODDY: Pass the juror for cause.

Cross-examination by O. G. YOUNG:

Q. Acquainted with Mr. Edmisson, the plaintiff?
A. No sir.
Q. Any of these gentlemen on the other side ever represented you in any litigation?
A. No sir.
Q. Any prejudice against a corporation?
A. No sir.
Q. Give them the same fair and candid consideration you would any other litigant?
A. Yes sir.

By Mr. YOUNG: Pass.

54 O. E. RHODES.

Direct examination by Mr. SNODDY:

Q. Will you state your name?
A. O. E. Rhodes.
Q. Where do you reside?
A. Byron.
Q. How far is that from Waynoka?
A. I couldn't state.
Q. What direction is Byron from here?
A. Northeast.
Q. Southeast?
A. Northeast.
Q. You say it is Barnes?
A. Byron.
Q. How long have you resided there?
A. About ten years.
Q. Are you acquainted with the plaintiff in this action Mr. R. C. Edmisson, this gentleman here?

Counsel indicates plaintiff.

A. No sir.
Q. Did you ever hear anything about this case until to-day?
A. No sir, I didn't.
Q. Heard anything of any of the facts in the case?
A. No sir.
Q. What business are you engaged in?
A. Farmer.

Q. Been engaged in that business ever since you have been in this country?
A. Yes sir.
Q. Are you engaged in handling any cattle in any way?
A. I have just a few on the farm, is all.
55 Q. Just simply what you handle on the farm?
A. Yes sir.
Q. Are you acquainted with any of the members of the corporation of the Drumm-Flato Commission Company, of Kansas City?
A. No sir, I am not.
Q. Have you ever had any dealings with them in any way?
A. No sir.
Q. Have you with any commission company?
A. No sir.
Q. Are you acquainted with Mr. Noah, the attorney for the defendant, one of the attorneys for the defendant?
A. No.
Q. Never has been your attorney in any matter?
A. No sir.
Q. Acquainted with Mr. Young, attorney for the defendant?
A. No sir.
Q. If you were selected to sit as a juror in the trial of this case, do you know any reason why you could not render a fair and impartial verdict, according to the law and the evidence alone?
A. Do not.

Mr. SNODDY: Pass the juror for cause.

Cross-examination:

Q. Any of these gentlemen on the other side ever represented you in any litigation, Colonel Snoddy or any of the others?
A. No sir.
Q. Have you any prejudice against corporations?
A. I have not.
Q. Give a corporation the same fair and candid consideration in a case you would any individual litigant, would you?
A. Yes sir.
56 Q. You say you haven't handled cattle to any extent?
A. No sir.
Q. Had no business with any cattle?
A. No sir.

By Mr. YOUNG: Pass.

C. H. CLYMER.

Direct examination:

Q. Please state your name?
A. C. H. Clymer.
Q. Where do you reside?
A. Augusta.
Q. Where?

A. Augusta.

Q. Are you acquainted—how long have you resided in this county?

A. Ten years.

Q. Have you resided at Augusta or in that neighborhood ever since you have lived in the county?

A. Well, practically so.

Q. What other part of the county have you resided in?

A. Well, I used to live nine miles west of that.

Q. West of Augusta?

A. Yes sir.

Q. Are you acquainted in the neighborhood of Quinlan?

A. No sir.

Q. Or Moscow?

A. No sir.

Q. I had never heard the name of that myself, and I thought probably you had; I see it is down there.

A. No sir.

57 Q. Are you acquainted with R. C. Edmisson, the plaintiff in this case?

A. No sir.

Q. Are you acquainted with any of the members of the corporation known as the Drumm-Flato Commission Company, of Kansas City?

A. No sir.

Q. Are you acquainted with Mr. Noah, one of the attorneys for the defendant?

A. I know him by sight is about all.

Q. Have you ever had any litigation in which he represented you?

A. No sir.

Q. Or any business dealings?

A. No sir.

Q. Acquainted with Mr. Young, here, one of the attorneys for the defendant?

A. No sir, never met him.

Q. What business are you engaged in?

A. Hardware business.

Q. Did you ever handle cattle?

Q. Nothing to amount to much.

Q. Simply in the hardware business?

Q. Yes sir.

Q. You have never heard anything about any of the facts in this case?

A. No sir.

Q. Ever heard of the case until to-day?

A. Never did, to my recollection, no.

Q. If you were selected to sit as a juror in the trial of this case, do you know any reason why you couldn't render a fair and impartial verdict?

A. I do not.

By Mr. SNODDY: Pass the juror for cause.

58 Cross-examination:

Q. You say you are not acquainted with Mr. Edmisson?
A. No sir.
Q. You have never saw the facts—heard the facts, rather, in this case before?
A. Probably did but don't remember of it.
Q. Ever handle cattle to any extent?
A. No sir.
Q. Have you any prejudice against a corporation?
A. No sir.
Q. Give a corporation the same fair and candid consideration you would any other litigant, would you?
A. I would.
Q. What firm are you a member of?
A. Clymer and Merrick.

By Mr. YOUNG: Pass.

PARK KEEFER.

Direct Examination:

Q. State your name?
A. Park Keefer.
Q. Where do you reside?
A. Near Clymer postoffice.
Q. What direction is that from here?
A. South and east.
Q. How long have you been a resident of that place?
A. Ten years.
Q. What business are you engaged in?
A. Farming.
Q. Ever handled cattle?
A. Not to amount to anything.
Q. Except a few for the farm?
59 A. Yes sir.
Q. Are you acquainted with the plaintiff in this action Mr. R. C. Edmisson, this gentleman here?

Counsel indicates plaintiff.

A. No sir.
Q. I mean the one sitting back, not the good looking man, not these two right behind me?
A. No sir.
Q. Did you ever have any dealings with the Drumm-Flato Commission Company?
A. No sir.
Q. You know any of the members of that corporation?
A. No sir.
Q. Acquainted with Mr. Young, one of the attorneys for the defendant? The one sitting by the side of Mr. Noah?
A. No sir.

Q. Either one of them ever have any legal business for you?
A. No sir.
Q. You know of any reason, if you were selected as a juror in this case, why you couldn't render a fair and impartial verdict according to the law and the evidence?
A. No sir.
Q. I believe you stated—I asked the jury together,—you never heard anything about this case at all?
A. Not to my knowledge.

By Mr. SNODDY: Pass the juror for cause.

Cross-examination by Mr. NOAH:

Q. Are you acquainted with Edmisson, the plaintiff?
A. No sir.
Q. Have you any prejudice against corporations?
60 A. No sir.
Q. Give a corporation the same fair and candid consideration you would any other litigant, would you, if you sat on the jury?
A. Yes sir.
Q. Ever handle cattle to any extent?
A. Why, nothing only a few, thirty head.
Q. Never have had any business with a cattle commission company?
A. No sir.

By Mr. NOAH: Pass the juror.

JOHN H. BOWMAN.

Direct Examination by Mr. SNODDY:

Q. Please state your name?
A. John H. Bowman.
Q. Where do you reside?
A. Four miles southwest of Aline.
Q. How long have you resided there?
A. Since the strip opened.
Q. Are you acquainted with the plaintiff, Mr. Edmisson, here?
A. I am not.
Q. Are you acquainted with any of the members of the Drumm-Flato Commission Company, at Kansas City?
A. No sir.
Q. Are you acquainted with Mr. Noah, one of the attorneys for the defendants?
A. Only by sight. I know Mr. Noah when I see him. I never had an introduction to him.
Q. He has never been—never had any litigation in which he acted as your attorney?
A. No sir.
Q. What business are you engaged in?
A. Farming.

61 Q. Did you ever handle cattle?
A. Handled a few cattle.
Q. Did you ever have any business transactions with the Drumm-Flato Commission Company at Kansas City?
A. No sir.
Q. Or any other commission company?
A. No sir.
Q. Have you ever heard anything about this case at all?
A. Never have.
Q. If you were selected to sit as a juror in the trial of this case, do you know of any reason why you could not render a fair and impartial verdict according to the law and the evidence?
A. I don't.

By Mr. SNODDY: Pass the juror.

Cross-examination:

Q. You say you are not acquainted with Mr. Edmisson, the plaintiff?
A. No sir.
Q. You got any prejudice against corporations?
A. No sir.
Q. You would give a corporation the same fair and candid consideration you would any other litigant, if you had to sit as a juror?
A. Yes sir.

By Mr. NOAH: Pass.

G. H. BREWER.

Direct examination:

Q. State your name?
A. G. H. Brewer.
Q. Where do you reside?
A. Near Barney postoffice.
Q. Are you acquainted with Mr. Edmisson, the plaintiff in this suit?
62 A. No sir.
Q. Are you acquainted with any of the members of the corporation known as the Drumm-Flato Commission Company?
A. No sir, not personally. I have saw them at Kansas City.
Q. Have you ever had any business transactions with them?
A. Not only I took a consignment of cattle to them once.
Q. Of your own?
A. No sir, Mr. Hale.
Q. How long ago was that?
A. That has been two years ago last Fall.
Q. You never had any business transactions with them yourself, your own cattle?
A. No sir.
Q. Are you acquainted with any of the members or representatives or managers of that corporation?
A. No sir.

Q. You know the president, Mr. Drumm?
A. No sir, I don't.
Q. You know Mr. Flato?
A. No sir, I might *of* saw him but then I don't know him; saw him and not know him.
Q. Did you ever have any other business transactions with any other commission company in Kansas City?
A. No sir.
Q. How long ago was this you say?
A. About two years ago last Fall.
Q. Have you ever heard what purported to be the facts in this case?
A. Never did.
Q. Did you ever hear of the case before?
A. No sir, I never did.
63 Q. Are you acquainted with Mr. Noah, one of the attorneys for the defendant?
A. No sir, I am not.
Q. Acquainted with Mr. Young, one of the attorneys for the defendant?
A. No sir.
Q. If you were selected as a juror to sit in the trial of this case, do you know any reason why you could not render a fair and impartial verdict?
A. I know of none.

By Mr. SNODDY: Pass the juror for cause.

Cross-examination by Mr. NOAH:

Q. Are you acquainted with Mr. Edmisson?
A. No sir.
Q. What is your business?
A. Farming.
Q. Always been a farmer?
A. Yes sir.
Q. Handle any cattle?
A. No sir, only just a few milk cows is all.
Q. Ever handle any particularly for yourself or anybody else?
A. No sir.
Q. Who was you taking that shipment for?
A. James M. Hale.
Q. James M. Hale?
A. Yes sir.
Q. Have you any prejudice against a corporation?
A. No sir.
Q. Give a corporation the same fair and candid consideration you would any other litigant if you sat on the jury?
64 A. Yes sir.
Q. Any of these gentlemen on the other side ever represented you in any matter in litigation?
A. No sir.

By Mr. NOAH: Pass.

D. P. CREEK.

Direct examination by Mr. SNODDY:

Q. State your name.
A. D. R. Creek.
Q. Where do you reside?
A. Byron.
Q. How long have you resided there?
A. About eight years.
Q. How long have you resided in Woods County?
A. About eight years.
Q. The same length of time. Are you acquainted with the plaintiff, Mr. Edmisson?
A. No sir.
Q. Are you acquainted with any of the members of the corporation known as the Drumm-Flato Commission Company?
A. No sir.
Q. Have you ever had any business transactions with any of them?
A. No sir.
Q. If you were—have you with any other commission company at Kansas City?
A. No sir.
Q. Are you acquainted with Mr. Noah, one of the attorneys for the defendant?
A. No sir.
Q. Mr. Young, one of the attorneys for the defendant?
65 A. No sir.
Q. Have you ever heard anything about what purported to be the facts in this case?
A. No sir.
Q. Ever heard of the case until to-day?
A. No sir, never did.
Q. If you were selected as a juror to sit in the trial of this case, do you know of any reason why you could not render a fair and impartial verdict?
A. No sir.

By Mr. SNODDY: Pass the juror for cause.

Cross-examination:

Q. Any of these gentlemen on the other side ever represented you in any litigation?
A. No sir.
Q. Any prejudice against corporations?
A. No sir.

By Mr. NOAH: Pass.

S. M. MARLETT.

Direct examination by Mr. SNODDY:

Q. State your name?
A. S. M. Marlett.
Q. Mr. Marlett, where do you reside?
A. At Ashley, eight miles and a half east of here.
Q. Are you acquainted with Mr. Edmisson, the plaintiff in this action?
A. No sir.
Q. With the—with any of the members of the corporation known as the Drumm-Flato Commission Company?
A. No sir.
66 Q. Acquainted with Mr. Noah, one of the attorneys for the defendant?
A. Yes sir.
Q. How long have you been acquainted with him?
A. I presume that is probably about eight years.
Q. Ever had any business transacted with him?
A. No sir.
Q. Ever been your attorney in any matter?
A. No sir.
Q. Acquainted with Mr. Young, one of the attorneys for the defendant?
A. No sir.
Q. What business are you engaged in?
A. Farming.
Q. Farming. Have you been engaged in the cattle business?
A. No sir.
Q. Handle cattle some?
A. Just a few on the farm.
Q. On the farm?
A. Yes sir.
Q. If you were selected to sit as a juror in the trial of this case do you know of any reason why you could not render a fair and impartial verdict according to the law and the evidence?
A. No sir.

By Mr. SNODDY: Pass the juror for cause..

Cross-examination by Mr. NOAH:

Q. Acquainted with Mr. Edmisson?
A. No sir.
Q. Have you any prejudice against corporations?
A. No sir.

By Mr. NOAH: Pass.

67 J. P. REAMS.

Direct examination.

Q. State your name?
A. J. P. Reams.
Q. Where do you reside?
A. Estella; about Estella.
Q. How long have you resided in this county?
A. Nine years.
Q. How long have you resided in the vicinity of Estella?
A. Nine years.
Q. What business are you engaged in?
A. Farming.
Q. Handle cattle to any extent?
A. Only what I would handle on a hundred and sixty acres.
Q. Are you acquainted with R. C. Edmisson, the plaintiff in this action?
A. No sir.
Q. Acquainted with any of the members of the corporation known as the Drumm-Flato Commission Company?
A. I know of them.
Q. Ever have any business transaction with them in any way?
A. No sir.
Q. With any commission company at Kansas City?
A. No sir.
Q. Acquainted with Mr. Noah, attorney for the defendant, here?
A. No sir.
Q. Never transacted any business for you?
A. No sir.
Q. I suppose Mr. Young never did?
A. No sir.

68 Q. I believe I didn't ask that question—did you ever hear anything about this case before to-day?
A. I don't think I did, never did.
Q. You are positive you never heard any of the facts in the case?
A. No sir, I never heard anything about the case.
Q. And the only thing you ever heard was the statement here to-day?
A. That is all I know about it.
Q. If you were selected as a juror to sit in the trial of this case, would you render a verdict according to the law and the evidence?
A. Yes sir.
Q. Do your best, would you?
A. Yes sir.

By Mr. SNODDY: Pass.

Cross-examination by Mr. NOAH:

Q. Acquainted with Mr. Edmisson?
A. No sir.
Q. Either of these gentlemen on the other side ever represented you in any matter?

A. No sir.
Q. Have you any prejudice against corporations?
A. No sir.
Q. Give a corporation the same fair and candid consideration you would any other litigant?
A. I would.

By Mr. NOAH: Pass.

69 M. C. KLUSTER.

Direct examination by Mr. SNODDY:

Q. State your name?
A. M. C. Kluster.
Q. Where do you reside?
A. Byron, Estella Township.
Q. How long have you resided in this county?
A. A majority of the time for ten years, I think.
Q. Lived in that neighborhood?
A. Yes sir, that is, when I was in the Territory at all.
Q. Well, that has been your home?
A. Yes sir.
Q. Acquainted with the plaintiff, R. C. Edmisson?
A. I have heard of the name is all.
Q. Not acquainted with him?
A. No sir.
Q. Acquainted with any of the members of the corporation known as the Drumm-Flato Commission Company?
A. No sir.
Q. Did you ever have any business transactions with them?
A. No sir.
Q. With that company or with others?
A. No sir.
Q. Did you with any commission company at Kansas City?
A. No sir.
Q. Well, what business are you engaged in?
A. Real estate.
Q. Did you ever handle cattle?
A. I have, some.
Q. In this territory?
A. No sir.
70 Q. To what extent have you handled cattle?
Q. Oh, I kept cattle on a farm, seventy-five or a hundred head.
Q. Never acted as a commission company?
A. No sir.
Q. Are you acquainted with Mr. Noah, one of the attorneys here?
A. I know him when I see him here in town.
Q. Never had any business transactions with him?
A. No sir.
Q. Or with Mr. Young here?

A. No sir, no one of them.

Q. If you were selected as a juror to sit in the trial of this case, do you know any reason why you could not render a fair and impartial verdict, according to the law and the evidence?

A. I do not.

By Mr. SNODDY: Pass.

Cross examination by Mr. NOAH:

Q. You say you have heard of R. C Edmisson?

A. I have heard the name.

Q. Have you been acquainted with him?

A. No sir, I have not.

Q. Have you any knowledge of the facts in this case?

A. No sir.

Q. You have handled cattle some, have you?

A. That was in northern Nebraska.

Q. How long ago?

A. Twelve or fifteen years ago.

Q. At that time did you have any dealings with a commission company?

A. No sir.

Q. Never did?

A. No sir, I never shipped any cattle.

71 Q. Any prejudice in your mind against a corporation?

A. Why, I don't think there would be.

Q. Well, you know, Mr. Kluster, don't you? Is there any prejudice in your mind against a corporation?

A. There is different kinds of corporations.

Q. Well, this is a cattle corporation?

A. I don't think I would have any prejudice against a cattle firm at all.

Q. If you are permitted to sit on the jury, would you give the defendant in this case the same candid and fair consideration, give the same fair and candid consideration to the testimony of the defendant you would for the plaintiff in this case?

A. Yes, sir.

Q. And find for the defendant, if you thought the evidence justified it, under the instructions of the court?

A. I would sir.

Q. Either of these gentlemen on the other side ever represented you in any litigation?

A. No, sir.

By Mr. NOAH: Pass for cause.

By the COURT: The plaintiff will take his first peremptory challenge.

By Mr. SNODDY: Excuse Mr. Bowman.

By the COURT: Stand aside. Call another juror.

By the CLERK: John C. Louthan.

JOHN C. LOUTHAN.

Direct examination by Mr. SNODDY:

Q. Mr. Louthan, state your name to the court.
A. John C. Louthan.
72 Q. Where do you reside, Mr. Louthan?
A. Close to Byron.
Q. What direction is that from here and how far?
A. South and west.
Q. How far?
A. I take it about sixty miles, right at the south end of the county.
Q. Are you acquainted with the plaintiff in this action, Mr. Edmisson, here?

Counsel indicates plaintiff.

A. No, sir, I am not. I have heard of his name and that is all.
Q. Have you any acquaintance with any of the members of the corporation known as the Drumm-Flato Commission Company of Kansas City?
A. No, sir.
Q. Have you ever had any dealings with that company?
A. No, sir.
Q. Have you with any other commission company at Kansas City?
A. Never did; had some dealings with the Lombards.
Q. Lombards? Acquainted with Mr. Noah, one of the attorneys for the defendant, here?
A. Yes, sir.
Q. Ever been attorney for you in any matter?
A. Yes, sir.
Q. About how long ago?
A. Well, just after the Strip opened I had him as one of my attorneys when I filed and contested on a claim, filed a contest on a claim down there.
Q. In the land office?
A. Yes, sir.
Q. That the only occasion you ever had him?
A. Yes, sir.
Q. You are not acquainted with Mr. Young, one of the attorneys for the defendant?
73 A. No, sir.
Q. He don't reside here. What business are you engaged in Mr. Louthan?
A. Farming.
Q. Ever handle cattle to any extent?
A. Oh, just a little, just about forty or fifty head.
Q. You handle cattle?
A. Yes, sir, about that number.
Q. About that number. You ever heard anything about this case?

A. Never have heard of the case to my knowledge.
Q. Don't know anything about the facts in the case?
A. No, sir.
Q. If you were selected to sit as a juror in the trial of this case, do you know of any reason why you couldn't render a fair and impartial verdict according to the law and the evidence?
A. No, sir, I do not know of any reason.

By Mr. SNODDY: Pass.

Cross-examination by Mr. NOAH:

Q. Mr. Louthan, have you any prejudice against a corporation?
A. No, sir.
Q. Give a corporation the same fair and candid consideration you would any other litigant, would you?
A. Yes, sir.
By Mr. SNODDY: Has Mr. Noah acted as your attorney—would the fact that Mr. Noah acted as your attorney have any influence on your mind in deciding this case according to the law and the evidence?
A. I don't think it would.
Q. Positive of that?
A. I would decide according to the law and the evidence. That is my way of doing business.

74 By the COURT: Defendant will take its first peremptory challenge.
By Mr. NOAH: We waive.
By the COURT: Plaintiff take his second peremptory challenge.
By Mr. SNODDY: Excuse Mr. Brewer.
By the COURT: Call another juror.
By the CLERK: J. L. Showalter.

J. L. SHOWALTER.

Direct examination:

Q. Just state your name in full to the court and jury.
A. J. L. Showalter.
Q. Where do you reside?
A. In Hopeton Township.
Q. How far is that from Alva?
A. Fifteen miles; thirteen south and two west.
Q. How long have you resided there?
A. Ten years.
Q. What business are you engaged in?
A. Farming.
Q. What has been your business generally in the last ten years? Farming, or have you handled cattle to any extent?
A. No, sir, no, sir, excepting sixty head or something of that kind.
Q. Acquainted with R. C. Edmisson, the plaintiff in this case?
A. No, sir.

Q. Acquainted with any of the members of the corporation known as the Drumm-Flato Commission Company?
A. No, sir.
Q. Ever have any business transactions with that company?
A. No, sir.
Q. Did you with any other commission company at Kansas City?
75 A. No, sir.
Q. Are you acquainted with Mr. Noah here, one of the attorneys for the defendant?
A. Yes.
Q. How long have you been acquainted with him?
A. Oh, I couldn't tell. Not a special acquaintance of any kind, only just a passing acquaintance.
Q. Ever act as your attorney in any matter?
A. No. I was in some business once, transacted some business and I believe I paid him some money once, I paid him over some money on a note, I ain't sure.
Q. Well, you have had no connection with him in any way as attorney or otherwise that would influence you in your verdict?
A. No, sir.
Q. No particular predilection for him to any extent?
A. No, sir.
Q. That is, you are not stuck on him to that extent?
A. No, sir.
Q. Did you ever hear any of the facts in this case?
A. No, sir.
Q. If you were selected as a juror to sit in the trial of this case, do you know of any reason why you could not render a fair and impartial verdict according to the law and the evidence?
A. No, sir.

By Mr. SNODDY: Pass the juror.

Cross-examination:

Q. You say you don't know Mr. Edmisson, Mr. Showalter?
A. I say I don't know him, yes.
Q. Do you remember hearing anything about this case?
A. No, I don't. Don't recall I ever heard anything
76 about it.
Q. Ever had any business with a cattle commission company?
A. No, sir.
Q. Have you any prejudice in your mind against a corporation?
A. I think not.
Q. Would you give a corporation the same fair consideration that you would any other litigant, if you sat on the jury?
A. Yes sir, I think I would.
Q. Evidence in its favor would have the same weight as for the plaintiff?
A. It would.

Q. Any of these gentlemen on the other side ever represented you in any matter of litigation?
A. No sir.

By Mr. NOAH: Pass.
By the COURT: Defendant will take its second peremptory challenge.
By Mr. NOAH: Waive.
By the COURT: Plaintiff will take his third and last challenge.
By Mr. SNODDY: Excuse Mr. Louthan.
By the CLERK: J. P. Jacobs.

J. P. JACOBS.

Q. Just state your name to the court and jury.
A. J. P. Jacobs.
Q. Where do you reside, Mr. Jacobs?
A. Alva.
Q. How long have you been a resident of Woods County?
A. Four years.
Q. Are you acquainted with R. C. Edmisson, the plaintiff in this case?
A. No sir.
Q. Are you acquainted with any of the members of the corporation known as the Drumm-Flato Commission Company?
77 A. No, sir.
Q. Acquainted with Mr. Noah, attorney for the defendant?
A. Yes, sir.
Q. Acquainted with Mr. Young, another attorney, the gentleman from Kansas City? What is it?
A. No, sir.
Q. Have you ever been engaged in the cattle business, handled cattle?
A. On a small scale.
Q. Yes, sir. If you were selected as a juror to sit in the trial of this case, do you know of any reason why you could not render a fair and impartial verdict according to the law and the evidence?
A. I do not.

By Mr. SNODDY: Pass the juror for cause.

Cross-examination by Mr. NOAH:

Q. Acquainted with Mr. Edmisson?
A. I am not.
Q. Ever hear what purported to be the facts in this case?
A. No, sir.
Q. Any prejudice against a corporation?
A. No, sir.
Q. Any prejudice against a live stock commission company?
A. No, sir.
Q. If you were permitted to sit in the trial of this case, would you

give a corporation, a live stock commission company, the same fair and candid consideration you would any other litigant?

A. Yes, sir.

Q. And decide the question upon the evidence and the law as given you by the court?

A. Yes, sir.

By Mr. NOAH: Pass.

78 By the COURT: The defendant will take its third and last peremptory challenge.

By Mr. NOAH: Mr. Jacobs, you may stand aside.

By the CLERK: W. C. Devereaux.

W. C. DEVEREAUX.

Direct examination by Mr. SNODDY:

Q. Mr. Devereaux, just state your name in full.

A. W. C. Devereaux.

Q. Where do you reside, Mr. Devereaux?

A. Carmen.

Q. Carmen? How long have you resided there?

A. Four years.

Q. How long have you resided in Woods County?

A. Four years.

Q. Lived at Carmen since you have been here?

A. Yes, sir.

Q. What business are you engaged in?

A. Farming.

Q. Are you acquainted with Mr. Edmisson, the plaintiff in this suit?

A. No, sir.

Q. Do you know any of the facts in this case or ever hear any of the facts in the case?

A. No, sir.

Q. Did you ever hear anything about the case until you heard it to-day?

A. No, sir.

Q. And all you have heard is the statement that was made to-day?

A. Yes, sir.

Q. Are you acquainted with any of the members of the corporation known as the Drumm-Flato Commission Company?

79 A. No, sir.

Q. Acquainted with Mr. Noah, one of the attorneys for the defendant?

A. No, sir.

Q. If you were selected as a juror to sit in the trial of this case, do you know of any reason why you could not render a fair and impartial verdict according to the law and the evidence?

A. No, sir.

By Mr. SNODDY: Pass the juror.

Cross-examination by Mr. NOAH:

Q. Either of these gentlemen on the other side ever represented you in any litigation?

A. No, sir.

Q. Have you any prejudice against corporations or a cattle commission company?

A. No, sir.

Q. Give them the same fair and candid consideration you would any other litigant, would you, if you sat on the jury?

A. Yes, sir.

Q. And decide the case on the facts and the law as given you by the court?

A. Yes, sir.

By Mr. NOAH: Pass.

By the COURT: Swear the jury.

Jury sworn by clerk.

By the COURT: State your case to the jury.

By Mr. SNODDY: May it please the court, and gentlemen of the jury: This is a case in which the plaintiff seeks to recover the sum of eight thousand dollars for the wrongful conversion of about four hundred head of cattle by the defendant company, and the property of the plaintiff. We expect to introduce evidence in this
80 case before the jury that on the 22nd day of November, 1899, that the Drumm-Flato—that the plaintiff, Edmisson and the Drumm-Flato Commission Company entered into a certain contract or agreement whereby Edmisson was to deliver over to the defendant company nineteen hundred head of cattle, provided he got nineteen hundred head of cattle, and didn't get over twenty-one hundred head of cattle, and two thousand head provided he got in excess of twenty one hundred head of cattle.

We expect to show to you that about the eighteenth day of December, 1899, that the plaintiff did deliver to the agent of the plaintiff company, defendant company, seventeen hundred and ten head of cattle. These cattle were not any particular age or grade of cattle, but were cattle just as they ran on the range, and were cattle covered by a mortgage executed by plaintiff to the defendant company.

That at the time of delivering these cattle, that the plaintiff also rounded up about three hundred and fifty head of other cattle, and held them in close pasture, ready to deliver them to defendant company; that only these seventeen hundred and ten head of cattle were driven to Curtis, a station on the Santa Fe System, line of road, in Woodward County, and they were shipped out by J. C. Bryson, n agent of the company and personally sent down there for the purpose of getting these cattle. The cattle were shipped to Kansas City, Missouri, and the defendant company received them, they were shipped to the defendant company and received by them; and that at that time, Mr. Edmisson, at the time or prior to the time these cattle were rounded up, on, I think, two days before the date they were shipped from Curtis, that they were tallied through a gate. As

they were counted out of Mr. Edmisson's pasture to a pasture owned and controlled by Mr. Ely Roberts, they passed through this gate from three to five abreast, and were counted through this gate by one E. F. Black, Mr. Holman, and Mr. Edmisson and Mr. Bryson, agent of the company.

81 We expect to introduce evidence that after the cattle were put through this gate, the boys were talking about this round up in the presence of Mr. Bryson, and Mr. Bryson never made any objection to the count, and in fact, agreed to the count and seemed satisfied with it.

That he shipped these cattle to Kansas City. At Curtis while the cattle were being loaded, Mr. Edmisson requested him to go back and get enough of the three hundred and fifty head of cattle to make up his nineteen hundred head, and Mr. Bryson refused to go back; it was cold, he didn't have time, and he wanted to get these cattle on the market and into the possession of the defendant company at Kansas City.

That Mr. Edmisson, Mr. Bryson and several other parties went with these cattle to Kansas City, and that there, Mr. Edmisson had a conversation about these cattle, with an understanding that Mr. Bryson was to return in a short time and go back with him and get enough of the remainder of these three hundred and fifty head of cattle to make up their nineteen hundred head.

Just prior to leaving Mr. Bryson told Mr. Edmisson that he would be out there the next evening and wanted Mr. Edmisson to meet him, and Mr. Edmisson did send a boy to the station to meet Mr. Bryson with a buggy or vehicle of some kind, in order to take Mr. Bryson back to the place where the cattle were held. Mr. Bryson didn't come, and the cattle were held for two weeks, and then turned loose in the larger pasture.

While Mr. Edmisson was on business, looking after some mules down on the edge of Dewey County or Woods County, that the commission company sent another man, J. R. Gober, to round up all the cattle Edmisson had, and ship them to them. We expect to prove that Mr. Gober and other parties acting for the defendant

82 company not only received sufficient cattle to make out this nineteen hundred head of cattle that plaintiff was to deliver to defendant under this contract, but that they received, the company received and took into their possession between four and five hundred head of other cattle, and that the company and their agents appropriated these cattle to their own use and benefit. This man Gober when he came out never made any statement to Edmisson of what he expected to do or anything of the kind, but went on the range and gathered up these other cattle, and when Mr. Edmisson went over and demanded a count of the cattle he had in his possession, that Gober told him if he attempted to count those cattle he would fill him full of lead, and for that reason he desisted in the counting and let them take off the remainder of the cattle.

We expect to prove that the cattle were taken by the company or their agent authorized to receive them, and that they received an excess above the number in the contract of about four hundred or

four hundred and fifty head of cattle. The value of the cattle was something like twenty-five or thirty dollars per head. Whatever that is will be a matter of proof. In case we prove this, it will be a matter for you to base your verdict upon, what they were worth. The value will be a matter of proof. And that is substantially what the plaintiff expects to prove.

By the COURT: Defendant state its case.

By Mr. YOUNG: If the Court please; Gentlemen of the Jury: Our side of this case will develop in evidence as follows: Along in 1898, Mr. Edmisson began doing business with the Drumm-Flato Commission Company at Kansas City, Missouri, and borrowed large sums of money from that company at different times, which sums were renewed from time to time, in one mortgage that covered thirty-three hundred and forty head of cattle of $38,460.55, and on another mortgage covering twenty-one hundred and seventy cattle,
83 securing a mortgage of $20,973.02.

These mortgages ran along from '98 to '99 by renewal, and along in the Fall and Summer, Fall of '99, Mr. Edmisson began to dispose of these cattle in divers ways, and the company thought, when the loan came due in November, '99, that they had better stop it, settle up. And during that Fall there was some thousand head of cattle shipped in to apply on this paper, leaving between forty five and forty-eight thousand dollars still due the company in November, 1899. When Mr. Edmisson shipped in this shipment of cattle, he went to Major Drumm, the president of this company, and proposed to Major Drumm that he had probably eighteen hundred or two thousand head of cattle down there, and told the Major it wasn't enough to pay this indebtedness, but he would turn these cattle over to Major Drumm if he would turn him over his paper and mortgages. There was then due something over forty-five or forty-eight thousand dollars. Major Drumm entered into an agreement in good faith with Mr. Edmisson that if he returned to his ranch, which he had—wasn't a ranch but a range, a range of country out there, Government land, where there was a few fences and a few pastures, that if he would return and deliver to their agent this number of cattle that he then would turn over this paper and these mortgages and clear him up of all his indebtedness to them. Mr. Edmisson returned with one Mr. Bryson, whom the company sent for this purpose. They supposed there was about twelve or fifteen hundred head of cattle, when they were in Kansas City, on November the twentieth, between eighteen and twentieth, and they shipped up this thousand head. They left these cattle rounded up, as it were,—they had rounded or held these cattle—they had rounded the whole country for twenty or thirty miles around and gathered all the cattle they could gather of Mr. Edmisson's, and they had—they supposed, twelve, fifteen or sixteen hundred head of
84 cattle that they left when they shipped out this eleven hundred head of cattle prior to making this contract on November 22, 1899. When they came back then to get this fifteen hundred head of cattle, or the nineteen hundred head of cattle that Mr. Edmisson was to give in exchange for his paper, his mortgages, they

found these cattle, Mr. Bryson found these cattle scattered over the country considerable, and it took a week or ten days to gather up these cattle. They gathered them up and drove them to a place called Curtis, over here, and loaded them on the cars and shipped them to Kansas City. The first count that was had on these cattle by Mr. Bryson or under Mr. Bryson's control or direction was made at Curtis where he counted into the cars fifteen hundred and fifty six head of cattle, and the sheriff levied on seventeen head of cattle and took them away from him there that he didn't ship. These fifteen hundred head of cattle were accompanied to Kansas City by Mr. Edmisson and Mr. Bryson. When they got to Kansas City,—as a rule the stock yards received the cattle from the railroad company and the commission company receives them from the stock yards company, where they are all counted together. These cattle counted out at Kansas City fifteen hundred and fifty six head of cattle, two hundred and forty three calves in that bunch, making fifteen hundred and fifty six head of cattle. Mr. Edmisson, when he arrived at Kansas City, was present when these cattle were received there, went in to insist upon the company giving him up his paper, claiming that these were all the cattle that he had, but Mr. Bryson, who had been down here, said he thought there was a few other cattle left on the range.

So Mr. Bryson couldn't work for the company any further, so they employed Mr. Gober, who was an adjoining ranchman to Mr. Edmisson. Mr. Gober went to work to gather up these cattle, and Mr. Edmisson refused absolutely to deliver to the Drumm-Flato Commission Company another animal, but instead of delivering the balance to make the nineteen hundred head of cattle, that
85 he had agreed to get, and that the company had agreed to take for this paper, he goes back home and through his agents and his employees, these cattle were scattered all over the country; what I mean by that is, that they were placed in different bunches and different places, some cattle as much as forty or fifty miles away from this ranch, and there was only about thirty cattle found by Mr. Gober in this Myers and Maxwell pasture, and the Gober ranch and the Edmisson ranch he found something like thirty or forty cattle; the balance he found from time to time in small bunches, with all the assistance he could get hold of, he mustered up by February, when he began this work was in December, three hundred and twenty six head of cattle, making fifteen hundred and fifty six head of cattle and the three hundred and twenty-six head of cattle all that the Drumm-Flato Commission Company ever did receive and all the cattle that were ever in this country that could be found covered by this mortgage, Mr. Edmisson absolutely refusing to go any further with the delivery of these cattle to Mr. Gober, but put every obstacle in his way to prevent him fathering the cattle or receiving cattle under the contract, or under the mortgage.

We will be able to show to you gentlemen, the testimony that will bear these facts out, showing that we only received, all told, eighteen hundred and eighty-one head of cattle, instead of nineteen head, nineteen hundred head of cattle that we were to receive, and the con-

tract provided if he had more than twenty-one hundred head of cattle that then the Drumm-Flato Commission Company was to receive two thousand head of cattle.

That is as I think you will find to be the exact facts in this case, and taking the application of the cattle or the proceeds of the cattle that were received after the twenty second day of November, and applying it on his indebtedness, it leaves an indebtedness of something over fifteen thousand dollars yet due the Drumm-Flato
86 Commission Company. That is we think will be the facts in this case that we will show you before we get through with the trial.

By the COURT: It is now five o'clock, gentlemen. I suppose it will be more convenient to commence in the morning. Gentlemen of the Jury, we will now adjourn this case until nine o'clock tomorrow morning. Be in your seats promptly at that time. During the adjournment, you will not talk with anyone about this case nor allow anyone to talk to you nor talk among yourselves, nor form nor express an opinion in the case until it is finally submitted to you. You will remember this admonition and it will be upon you at every adjournment even though the court should omit to bring it especially to your attention. Adjourn court until tomorrow morning at nine o'clock.

Whereupon court stood adjourned until nine o'clock A. M., April 28, 1904, at which time the trial of said cause was resumed.

By the COURT: Call the jury.

Jury called by clerk.

By the CLERK: All present, your Honor.

By the COURT: Proceed with your evidence. Proceed with the case.

By Mr. SWINSALL: Mr. Edmisson, take the stand.

87 R. C. EDMISSON.

R. C. Edmisson, plaintiff in the above entitled cause, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination by CHARLES SWINDALL:

Q. State your name to the court and jury.

A. R. C. Edmisson.

By Mr. NOA[illegible]Just a moment. The defendant objects to the introduction of any testimony under the petition on the ground that it does not state a cause of action. Mere formal objection for the purpose of saving the record, if there is anything in it.

By the COURT: Objection overruled.

By Mr. NOAH: To which we except.

By the COURT: I take it for granted the case having gone to the Supreme Court once if there was anything of that kind in it, you would have noted it before.

By Mr. NOAH: There was no objection made at the other time.

Q. Where do you reside Mr. Edmisson?

A. Quinlan, Woodward County.

Q. Speak up a little louder so all these gentlemen can hear you.

A. Quinlan, Woodward County, Oklahoma.

Q. How long have you been a resident of Quinlan, Woodward County, Oklahoma Territory?

A. A little over five years.

Q. Are you the plaintiff in the case of R. C. Edmisson *versus* the Drumm-Flato Commission Company?

A. Yes sir.

Q. State what business you was engaged in in November and prior thereto, November, 1899, and prior thereto?

88 A. I was in the stock business.

Q. Where were you carrying on this business in the month of September, October and November, 1899?

A. In the southwest corner of this county, and the southeast corner of Woodward County. Right about the line.

Q. What if any business dealing or transaction did you have with the Drumm-Flato Commission Company, the defendant, on the twenty-second day of November, 1899?

A. I had a—made a contract with them in which I was to deliver to them a certain amount of cattle.

Q. Have you got the original contract with you?

A. No sir, I haven't got it.

Q. Do you know where it is?

A. Well, it was in with the papers in this court. I never have saw it since.

By Mr. YOUNG: Yes, that's a copy.

Q. Will you look at that instrument, and state whether or not "Exhibit A" attached to your petition—state whether or not that is a copy of the original contract entered into between you and the Drumm-Flato Commission Company on the twenty second day of November, 1899?

Counsel hands witness paper.

By the COURT: Oh, answer the question. Don't take so much time.

A. Yes sir.

By Mr. SWINDALL: We now offer in evidence this copy of the original contract entered into between the Drumm-Flato Commission Company and R. C. Edmisson, plaintiff, on the twenty-second day of November, 1899, and ask that it be marked "Exhibit A."

89 By Mr. NOAH: To which we object. There is one witness on the stand.

By the COURT: Yes sir. Examine the witness first.

Q. State what if anything was done by you under this contract entered into on the twenty-second day of November, 1899, with the defendant, Drumm-Flato Commission Company.

A. Yes sir. I went home that night, got home next evening and as soon as we could get ready, we went to work rounding up the cattle, and I delivered them seventeen hundred and ten head of them.

Q. You went home from where, Mr. Edmisson?
A. From Kansas City, where I made the contract.
Q. This agreement was made at Kansas City?
A. Yes sir, made at Kansas City.
Q. About how long were you rounding up these cattle?
Q. Well, I wouldn't say positively; it must have been some seven or eight days possibly; may be a little more.
Q. Who was there assisting you, if anybody, in rounding up these cattle?
A. Mr. Bryson was there and Mr. Black, Mr. Brothers, Mr. Holman, Mr. Guthrie.
By the COURT: Were the others your men?
A. Sir?
By the COURT: Were the others your men?
A. The others were men who were hired.
Q. State who Mr. Bryson was representing there?
A. Mr. Bryson was the agent of the Drumm-Flato Commission Company.
Q. State who employed Mr. Black and Mr. Holman and Mr. Brothers to assist in this round up, if you know.
A. Mr. Bryson.
90 Q. State about the size of this pasture, Mr. Edmisson, that you rounded up at that time?
A. The pasture that we rounded up at that time was oh, probably ten by twenty miles.
Q. What kind of land was it, level or broken land?
A. It was rough, conyony country; some draws, brakes, some canyons, brush, some prairie.
Q. Did you round your entire pasture at that time?
A. No sir, we rounded, oh, possibly two-thirds of it.
Q. What part of the country did you round?
A. The east end and a little of the northwest corner, or rather, north.
Q. State when this round up was made, as near as you remember.
A. It was between the twenty-second of November and the first of December, 1899.
Q. State how many cattle you rounded up at that time of yours.
A. Seventeen hundred and ten head.
Q. What was done with these seventeen hundred and ten head of cattle?
A. I delivered them to Mr. Bryson.
Q. State where they were delivered.
A. We counted them through a gate west of my house about three quarters of a mile.
Q. State who was present at this count.
A. Mr. Bryson, Mr. Black, Mr. Bolman, Mr. Brothers, Ed Edmundson and myself. As well as I recollect.
Q. State what was done with these cattle after they were counted through this gate.
A. Mr. Bryson taken the cattle and moved them off from the

fence up on to the flat and held them there, that is, he put them under hold.

91 Q. State whether or not they were in the pasture or on the open range at that time.

A. They were in the pasture that belonged to Mr. Harrington and Mr. Roberts.

Q. Mr. Ely Roberts?

A. Yes sir.

Q. About what time of day was it when you counted them through this gate, Mr. Edmisson?

A. Well, sir, it was—I couldn't say positive, about the time, but it was between three o'clock and six, and would be my recollection. It was after dinner, some time after dinner.

Q. What day of the month and what month and what year, if you remember?

A. I don't remember the exact date.

Q. What month and year?

A. It was the last of November or the first of December, I think about 1899.

Q. Now, state how these cattle were counted through the gate, Mr. Edmisson.

A. The cattle was counted by Mr. Black and Mr. Bryson and myself, and we had other men back stringing them out, putting a few through at a time. We had a bunch, the bunch kind a back, and we would drive in a small bunch and drive them through a few at a time, and whenever we got a hundred, then we would tally.

Q. State how you tallied this count.

A. I tallied by tallying on a book, making a mark. Some tallied by tying a knot in a rope.

Q. State if you know who tallied by tying a knot in a rope.

A. My recollection now is Mr. Black kept tally that way; I disremember how Mr. Bryson kept tally, whether marking or tying a rope.

92 Q. About how many head passed through the gate at the time they were counted through, at one time, I mean, abreast?

A. Oh, sometimes there was one, sometimes two or three, four, but only a few at a time so we could get a correct count. We strung them out in a string so we could get a count.

Q. Now, after these cattle were rounded up and prior to the time you counted them out, state what you did with reference to cleaning the herd of strays.

A. We rounded them up on the school section south of my house and we cut all the strays out, all the cattle that wasn't in my mark or brand, and cleaned the herd clean, and then we counted them through that gate, and delivered them to Mr. Bryson.

Q. State what your mark was at that time, Mr. Edmisson.

A. My—I had two or three brands.

Q. Well, I am talking about your holding mark, your own mark.

A. My mark was the "X-2-Bar" cattle, was an under half crop on the right and a crop in the left.

Q. State what the different brands were on these cattle?
A. They were more "X-2-Bar" on the left hip or left side, some of them had a figure 2 on the left jaw, and we had some cattle that was branded "55" on the left side and a few branded "55" with a bar under it on the left side.
Q. State whether or not there was any "J-W" cattle in this herd?
A. Yes sir, there was some cattle that were branded "J-W" on the left hip—left side or right side, either one. They were branded with a "5" right on the left hip also.
Q. State whether or not Mr. Bryson was present at the time this count was made?
A. Yes sir, he was there.
93 Q. State whether or not Mr. Bryson was present and agreed to the count at that time?
A. Yes sir, the count seemed to be satisfactory.
Q. Now, were—after these cattle were turned into the Harrington and Ely Roberts pasture, what was done with them then?
A. Mr. Bryson taken them to Curtis to the station, and shipped them.
Q. Now, after this seven hundred—seventeen hundred head—just withdraw that question. How many cattle were you to deliver to Drumm-Flato Commission Company under this contract?

By Mr. NOAH: That is objected to as incompetent.
By the COURT: Objection sustained.

Q. State what if any other cattle you ever rounded up after this delivery of seventeen hundred and ten head to Mr. Bryson.
A. Yes sir, I—the day that he left my place, I rounded up and put in that pasture between three and four hundred of cattle, in the small pasture.
Q. About what sized pasture was this?
A. Well, that was probably four sections.
Q. Was it your own pasture.
A. Yes sir.
Q. How many did you say you put in there?
A. Between three and four hundred head.
Q. What did you put those cattle in there for?
A. To take care of them until I could get Mr. Bryson back for to receive the balance of his cattle.
Q. How many more was he to receive?

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial. The contract itself is the best evidence.
By the COURT: The contract itself is the best evidence. It is incompetent for that reason.

94 Q. State whether or not you went with Mr. Bryson to Curtis at the time these cattle were taken there?
A. No sir, I never went with him.
Q. State whether or not you was there at the time these cattle were being shipped or a part of them was being shipped?
A. Yes sir, I went to Curtis before he shipped, to get him to come back to get the balance of his cattle.

Q. Did he come back and get the balance?

A. No sir, he said the cattle was getting thin, and he wanted to ship them out, and he would come right back as soon as he delivered them and get the balance.

Q. And he said he would come back as soon as he shipped these cattle?

A. Yes sir.

Q. State who if anyone was present at this conversation?

A. Well, sir, there was at one time we talked about the matter, Mr. Black was there.

Q. E. F. Black?

A. E. F. Black, and I spoke to him and arranged with him several times for to get him to come back and get the balance of the cattle, and there was other boys there, but I disremember who they was, at present.

Q. Did he refuse to come back at that time?

A. Yes sir, he said the cattle was too thin to hold any longer and he would have to dispose of them and get them on to feed.

Q. Well, what did you do then?

A. He asked me to help him to load the cattle and get them through to Kansas City, and I assisted him in loading the cattle and went down with the first train load of cattle that went.

Q. You went with the first train load that went out?

A. Yes sir.

95 Q. Did Mr. Bryson go with that train load?

A. No sir, he came with the second.

Q. Do you remember the date you went to Kansas City?

A. No sir, I don't, now.

Q. Did you see Mr. Bryson in Kansas City after you got there?

A. Yes sir, he was there the next day.

Q. Do you know what time he came in after you got there?

A. Well, I think he was two or three hours later than I got there.

Q. Did you have any conversation with him in Kansas City relative to coming back and getting the rest of these cattle, and if so, state what it was.

A. Yes sir. I talked with him about the matter, and he said he was going out with me that night, but when I got ready to leave, he came to me and told me he couldn't go, he had some other business he was going to look after for the company, and as soon as he got—as he could wind up that deal, he had to go on down south, he said, and he would be there the next day afterwards, and for me to have a man to meet him at the railroad, which I sent a man to the railroad, but I didn't get no Mr. Bryson.

Q. Did he come at all the next day as he told you there he would do?

A. No sir.

Q. Did he ever come back?

A. Never did.

Q. State who if anyone came there and got these cattle?

A. Well, I never saw anybody get them, but I was away from home.

By Mr. NOAH: Objected to as incompetent, if he didn't know himself, he can't testify.

By the COURT: Of course, you can only tell what you know about the matter.

96 A. I was away from home and when I got back I found a note there signed by Mr. Gober that he had come and got the cattle, said he was authorized by——

By Mr. NOAH: Just a moment; the note itself is the best evidence of its contents.

A. Well, I have got the——

Q. Do you know Mr. Gober?

A. Yes sir.

Q. State who he was representing.

A. Drumm-Flato.

By Mr. NOAH: That is objected to for the same reason.

By Mr. SWINDALL: They admitted in their opening statement he was the agent of the company.

By the COURT: Oh, yes, I suppose there is no objection on that point.

Q. State whether or not you ever saw any cattle of your mark and brand and of your cattle in Mr. Gober's pasture after that date?

A. Yes sir, along about the first of January, or the last of December following, why I went to round up, went over to a round up where they was rounding up, rounding them up there—well, it might have been a little later than that, and I saw quite a number of cattle there.

Q. Was it the last of January or the first of December following—the last of December or the first of January following?

A. The last of December or the first of January.

Q. That was December, 1899, or the first of January, 1900?

A. Yes sir.

Q. Now state what cattle if you saw any you saw in his pasture, of yours?

97 A. Well, I saw quite a bunch; I wasn't permitted to count them. I attempted to count them, but they told me I couldn't do it.

Q. Who told you you couldn't count them?

A. Mr. Gober.

Q. What did he say to you at that time about counting those cattle?

A. He said I couldn't even look like I wanted to count them, and if I made an attempt, he would fill my hide full of lead.

Q. Now, when did you ever see any of your cattle after that date, after January, 1900, in the possession of Mr. Gober?

A. I saw them all along during—just before they taken them off I saw quite a bunch of cattle they had on feed at one or two places.

Q. Did you ever see them after they took them off on feed?

A. Yes sir, I saw them on the range there, the range joined me.

Q. After what time, about what time of year was that?

A. Well, that was in the latter part of the summer, July or August, is my recollection, that I went through the cattle.

Q. State who was with you if anyone at the time you went through the herd?

A. Otis Guthrie.

Q. State whether or not you counted these cattle at that time, the remnant that was left there?

A. We counted them as best we could in the heat of the day; the cattle would come on the creek, there was a creek run diagonally across the pasture, and so in the heat of the day we rode up and down that creek and made an estimate or counted the cattle as well as we could. Of course——

Q. About what time of day did you commence to count?

A. Well, it must have been nine or ten o'clock, may be a little later.

Q. What time did you complete it?

Q. Well, it was three or four o'clock in the evening before we got entirely through, riding up and down the creek looking through them.

98 Q. How many cattle of your mark and brand, of your cattle did you count there at that time?

By Mr. NOAH: Objected to as incompetent, irrelevant and immaterial.

By the COURT: Objection is overruled.

By Mr. NOAH: Exception.

A. My recollection is now about five hundred and seventy-five head.

Q. Seventy-five hundred and seventy-five?

A. Five hundred and seventy five head.

Q. Five hundred and seventy five head. Were these cattle in charge of Mr. Gober at that time?

A. They was in his pasture.

Q. Was he there?

A. No sir, held by his men.

Q. Held by his men?

A. Yes sir.

Q. Now, you stated a while ago, Mr. Edmisson, that after this delivery to Mr. Bryson of seventeen hundred and ten head of cattle, you rounded up about three hundred and fifty or four hundred head of cattle and put in that small pasture. Now, state what if any other part of your cattle you hadn't rounded up at that time and never did round up—I mean what part of your pasture?

A. The west—no, the east, about two-thirds of the east part of the pasture was the part that we never had worked; that is, we didn't work on that run, about two-thirds of the pasture, which was the southeast part of the pasture.

Q. Southeast?

A. Of this big pasture.

Q. Well, what part of the pasture would that be of your pasture?

A. Or, the southwest part of the pasture, I should have said.

Q. The southwest part of your pasture, instead of the southeast?

99 A. Yes sir.

Q. State whether or not you ever saw any of your cattle in that part of the pasture?

A. Yes sir, I saw a good many of my cattle in that pasture.

Q. About how many head?

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial; not time being stated.

By the COURT: Well——

Q. Now, after this delivery I am talking about of this seventeen hundred and ten head of cattle and after you had rounded up this three hundred and fifty or four hundred cattle, state whether or not you ever saw any of your cattle in the southwest part of your pasture, that wasn't rounded up?

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial.

By the COURT: It is incompetent, unless you can trace them to the defendant.

By Mr. MARUM: We expect to, your Honor.

By the COURT: Why not trace them first?

By Mr. SWINDALL: All right. I would rather do that, I would rather do that.

Q. Now, Mr. Edmisson, state at the time that Mr. Gober told you if you attempted to take any of these cattle that he would fill your hide full of lead, state whether or not he was armed at that time.

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial.

By the COURT: Oh, I think it is unnecessary to go into that question here.

By Mr. SWINDALL: I don't think it is incompetent to show that a man couldn't go and count his own cattle.

100 By Mr. YOUNG: There is only one question here, the number of cattle. The charge is not a criminal one at this time.

By the COURT: I don't think it is material at all, except as bearing upon the—I don't think it makes any difference, really; the man refused to let him count them, and he is not supposed to get into an altercation with him.

Q. State if you know of your own knowledge what became of these cattle in the southwest part of the pasture?

A. I suppose Mr. Gober got them.

Q. I am asking what you know, Mr. Edmisson, not what you suppose. Do you know what became of them?

A. I don't know.

Q. State whether or not you were acquainted with the market value of cattle of this kind and description there at that time, in the market nearest the place where your pasture was located, that is, the market of Curtis?

By Mr. NOAH: Just a moment. That is objected to as incompe-

tent, irrelevant and immaterial, and attempting to fix the market by his own statement.

By the COURT: No, he is asking if he knows the values. He can answer yes or no.

By Mr. NOAH: He fixes the market at Curtis. It is a question of fact, just where that nearest market is.

By the COURT: Well, you can state the nearest market where the cattle were taken from.

A. I know what I was offered.

By the COURT: Oh, no. What they were actually worth in the market.

Q. What they were actually worth in the market there?

A. Yes sir, I think I would know.

Q. What is that average market value of this class of cattle at that time?

101 By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial, unless that market place is fixed by the testimony itself.

By the COURT: The objection is overruled.

By Mr. NOAH: Except.

By the COURT: Answer the question.

A. From twenty to twenty five dollars.

By the COURT: Not the average market value. What is the market value of the cattle?

A. From twenty to twenty five dollars a head.

Q. State whether or not you saw any cattle of your marks and brands in Mr. Gober's pasture there during the winter of 1900, after the count in November, the count to Mr. Bryson, in December, of this seventeen hundred and ten head of cattle and this round up you made of three hundred and fifty head of cattle, state whether or not you saw any cattle there in Mr. Gober's pasture of your marks and brands that were dead?

A. Yes sir, I saw quite a number.

Q. Well, state how many you could identify of your mark and brand on?

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial.

By the COURT: When was it he said he counted these cattle?

By Mr. MARUM: Away along in January, and in the spring.

By the COURT: Let me see, when did he count them? What do you saw about that? When was it you made this count on the creek?

A. That was in July or August somewhere along there.

By the COURT: July or August?

A. Yes sir.

By the COURT: What year? 18— or 19—?

By Mr. SNODDY: 1900.

102 Q. Now, state what if any cattle of your mark and brand you saw there in Mr. Gober's pasture that were dead after

this delivery to Mr. Bryson after the time you made this round in July or August?

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial.

By the COURT: It is incompetent unless you show the cattle were in his possession and taken from the plaintiff.

By Mr. SWINDALL: That is what we say, they were in Gober's pasture.

By the COURT: That might be but they might stray over there. The pastures were close together.

By Mr. MARUM: There were none left in the other pasture.

By the COURT: You haven't shown that. You are assuming that.

Q. You know whether there was any cattle left in your pasture after Mr. Gober completed his round up?

A. Nary one.

Q. Were all the remaining cattle you had after your delivery to Mr. Bryson taken by Mr. Gober?

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial, leading and suggestive.

By the COURT: Yes, and this witness has already said he didn't know anything of that personally, wasn't there when they were taken.

Q. Did you ever see any cattle in your pasture after that time?

A. No sir.

By Mr. SWINDALL: That's all.

By the COURT: Cross examine.

Cross-examination of R. C. EDMISSON by O. G. Young:

Q. Mr. Edmisson, what time was it you counted these cattle that you say you counted through the gate?

A. Those I counted on the creek, Mr. Young?

103 By the COURT: Through the gate.

A. Through the gate? Oh, It was some time in the evening after noon, after dinner, between, I would think it was between three and six o'clock, may be, between three and six o'clock.

Q. Between three and six o'clock?

A. Yes sir.

Q. What condition were those cattle in?

A. You mean what flesh?

Q. Yes sir, as to flesh?

By Mr. SWINDALL: Well, we object to that as incompetent, irrelevant and immaterial.

By the COURT: I suppose it is immaterial under this contract, is it not?

By Mr. YOUNG: Well, your Honor, some of his testimony here now, he is testifying they were in a bad fix, thin and poor, and I want to show——

By the COURT: He testified that Mr. Bryson said so.

By the COURT: He gave that as an excuse why he didn't take the balance.

By Mr. YOUNG: It has a bearing upon the counting of these cattle through the gate. Counting seventeen hundred head of cattle through a gate between three and six o'clock is a circumstance we want to bring out.

By the COURT: I don't know that it made any difference in the men's count whether they were poor or thin.

By Mr. SWINDALL: More likely to be correct.

This count in this case, we say there was never any count made, impossible to make a count in that time.

By the COURT: Well, if it has any bearing upon that proposition, of course you can show it. I don't see what bearing it would have, whether they were poor or thin or medium.

104 By Mr. YOUNG: Only that the jury might infer some natural facts about the condition of things.

By the COURT: Well you may state what it is.

By Mr. SWINDALL: I have heard of cattle so thin they wouldn't make a shadow but not so thin they couldn't be counted.

By the COURT: What condition were they in?

A. They were range cattle, running on the range and some were in something near fat enough for beef, while some of them were thin like.

Q. Now, how were they—were they stopped before they arrived at the gate and cut off in details and taken through the gate in bunches?

A. Well, they was rounded up on the flat, that is, they were held on the flat and they would drive them in bunches, kind of string them out one would try naturally to follow another, the other cattle, and they would kind of hold them out, divide them back, and hold them.

Q. What sized bunches would they divide them into?

A. Well, sometimes there would be no stop, they would be gradually passing through all the while; some of them stood closer to the gate than others of the boys, and they was gradually stringing them out and passing them through the gate.

Q. Was there anybody called the tally as they passed through the gate?

A. Yes sir.

Q. Who called the tally?

A. The one who got his hundred first, he would call.

Q. Was that the only tally that was made, by hundreds?

A. By hundreds, yes sir, and after we got through, we compared tallies.

Q. Now, which side of the gate was this man Bryson on?

A. Bryson was on the north side, him and Black.

Q. Him and Black was on the north side. Where was you?

A. I was on the—I think rather north. The gate set—yes, a little northeast, but you might say I was on the south side, I was on the opposite side from them two.

105 Q. Now, you say these cattle went through in bunches from one to how many in a bunch would go through?

A. Oh, probably they would string them out, one or two, may be three or four would attempt to get through at a time.

Q. And there wasn't any call made except when you got to the hundred?

A. When we would get to a hundred, some fellow would say so, say a hundred, the one that got there first, and then we would tally at the—tally up, that is we would make a mark or tie.

Q. Did you all have a hundred exactly each time?

A. Yes sir, when we got to a hundred we would stop and tally up.

Q. Did you stop the cattle in the gate while you settled that up?

A. Yes sir, we would kind a close up, begin to close up so no more could pass through until we tallied.

Q. You would stop the cattle at the time?

A. Yes sir, we would stop them at the gate.

Q. Then these cattle, when they stopped at the gate, would naturally bunch up at the gate, on the other side, try to get through?

A. Not very much.

Q. Not very much? How did Bryson keep his tally?

A. My recollection is on a book.

Q. On a book?

A. Yes sir.

Q. How did Black keep his tally?

A. With a rope, I think.

Q. How did you keep your tally?

A. I marked mine on a book.

Q. Have you got that book with you?

A. No sir, I haven't got it.

Q. Where is that book?

106 A. I have got it misplaced some place or other, can't find it.

Q. Now, you say you cleaned out all the strays that there was in these cattle before they went through the gate?

A. Yes, sir.

Q. Were these cattle rounded up the next day and worked again?

A. Yes, sir.

Q. How many strays were cut out at that time, if you know?

A. I couldn't tell you how many, not very many.

Q. Was you at that round up?

A. Yes, sir.

Q. Whose cattle were cut out that day?

A. There was different cattle. There was some that belonged to the headquarter ranch, they called it Smith, Maxwell and Morris, and some belonged to Mr. Roberts, and probably others, I couldn't say.

Q. Now, after these—after the herd was rounded up and passed through the gate, then these cattle were taken on to Curtis, were they not?

A. They were turned into that pasture there that night, and they let the cattle get away and they mixed with what cattle there was left in that pasture, the Harrington and Roberts pasture, so they didn't——

Q. They rounded them the next morning to cut these cattle that had mixed in with them that night, to get them out?
A. Yes, sir.
Q. So when you say they got away, where did they get away to?
A. They got—they quit herding them that night.
Q. Well, did they get back into your pasture they come out of?
A. No, sir.
Q. Whose pasture did they get into?
A. They stopped in the Harrington and Roberts pasture.
Q. They stopped in the Harrington and Roberts pasture?
A. Yes, sir, which was a three wire fence, the most of it.
Q. So they didn't get out of that pasture, didn't get away that night?
107 A. No, sir.
Q. They didn't get away?
A. They attempted to herd them and it got dark and they quit them, and some way——
Q. That is, the cattle were taken on to Curtis—how long was it after they had passed through that gate that they arrived at Curtis?
A. Well, I wouldn't be positive about that, but my recollection is the next day evening, I——
Q. What was you doing the next day?
A. I went—you mean the day we rounded up and cut them loose cattle out?
Q. No, I mean the day they went to Curtis, you say you didn't go with them?
A. The day they started from the Roberts pasture, I went to the round up the headquarter men had to get some cattle out of that round up, what is called the school section pasture, or the R. H. K. pasture, which pasture was cut up into small pastures and had different names for them.
Q. Inside of this large pasture, what is known as the Chapman-Maxwell pasture, that pasture enclosed a large country there, and these small pastures, too?
A. Yes, sir.
Q. Now, did these fences remain up or did the cattle all run together in this large pasture?
A. Yes, I suppose they had kept them up; some times of course the gates was left open and they——
Q. Now, when did you say—when did you next see these cattle?
A. I saw them at Curtis.
Q. At Curtis?
A. Yes, sir.
108 Q. What was you doing at Curtis to see these cattle?
A. I went up to see Mr. Bryson.
Q. What did you say you went up there to see Bryson for?
A. I went up there to get him to come back and get the balance of these cattle that we had left, that we had there, until I would get them to him.
Q. Where did you have the balance of these cattle at?
A. In this little pasture.

Q. How many head did you say you had?
A. Between three and four hundred head, I disremember just now.
Q. He didn't go back with you then?
A. No, sir.
Q. Did you all tally the cattle when they were loaded on the cars that night?
A. No, sir.
Q. Were you there when the cars were loaded?
A. I was there when the first train was loaded.
Q. Then you went to Kansas City?
A. Yes, sir.
Q. What did you go to Kansas City for?
A. I went to Kansas City to see when they would come back and get the balance of the cattle.
Q. That was all your business there, went there expressly to see when they would come back and get the rest of these cattle?
A. Mr. Bryson asked me if I wouldn't help him, that it was more than he could look after himself, and I went to assist him in getting the cattle through in the best shape we could.
Q. When they got to Kansas City, these cattle were all counted again by the railroad company to the stock yards company?
A. I don't know anything about that.

109 By Mr. SWINDALL: We object as incompetent, irrelevant and immaterial.
By the COURT: He has already answered your question.
By Mr. SWINDALL: What was the answer?
Last preceding question and answer read to counsel by stenographer.

Q. Did you see the cattle after they got to Kansas City?
A. Seen a part of them.
Q. Where did you see them?

By Mr. SWINDALL: Objected to as immaterial.
By the COURT: Oh, he may answer.
By Mr. SWINDALL: We don't know whether all the cattle ever got to Kansas City, or whether they was delivered to him.
By the COURT: The witness stated that—or I believe he did, that he went with him. Answer the question.

A. Answer it, you say?
By the COURT: Yes, sir.
A. I seen part of them.
By the COURT: Where, the question is?
A. Where? In the yards.
Q. You saw the train load Mr. Bryson brought in?

By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.
By the COURT: Objection overruled.
By Mr. SWINDALL: Exception.

A. Answer the question, sir.

By the COURT: Yes, sir.

A. Don't know that I did.

Q. As a matter of fact, Mr. Edmisson, wasn't you present when these cattle were counted to this commission company by the stockyards company?

A. No, sir, was not.

110 By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.

By the COURT: The question is answered.

Q. Did you see Major Drumm while you was up there?

A. Yes, sir.

Q. What did you say to Mr. Drumm—did you have any conversation with him?

A. Yes, sir.

Q. What did you say to him?

A. Told him how many cattle we had.

Q. How many did you say you had?

A. Seventeen hundred and ten.

Q. What did he say?

A. Well, he got mad and wanted to know what the sheriff stopped them cattle up there for, and ordered me out of his office.

Q. What cattle had been stopped by the sheriff?

A. I believe—I don't know—I don't know how many.

Q. You say you told him—who was present when you told him that?

A. There was nobody present.

Q. Didn't he tell you right there and then there was only fifteen hundred and fifty six head of cattle that had been received there and didn't you and him get into a controversy right there about that?

A. No, sir, the cattle wasn't all in at that time.

Q. The cattle wasn't all in at that time?

A. No, sir.

Q. What time of day was this?

A. That was early in the morning.

Q. And Major Drumm told you the cattle had been attached by the sheriff down here and you only had fifteen hundred and fifty-six head, according to the tally here?

111 A. Never said it.

Q. Didn't Mr. Lampe tell you so?

A. No, sir, I never told Mr. Lampe.

Q. Had no conversation with Mr. Lampe?

A. Not about the cattle at all, sir.

Q. Now, I will ask you, Mr. Edmisson, if when you arrived at Kansas City, you did not go into Major Drumm's office and tell Major Drumm there was a mistake in that agreement and that you understood him to say that if all the cattle you had were delivered to him that it would satisfy the debt, just the same as if you get the nineteen hundred head and if you had twenty one hundred head that you was to have two thousand head, but that you told

him in that conversation, in the presence of Mr. Lampe that you had delivered him all the cattle that you had?

A. No, sir, I never made no such statement to Major Drumm.

Q. You did contend that that contract ought to have contained that clause, didn't you, that if he gathered nineteen hundred, the paper was to be turned over for what he could gather?

A. Yes, sir. The contract was this, he says "I will tell you what I will do further, Edmisson," he says, "If you haven't got enough cattle for to fill this contract, why," he says, "I will turn over all the paper to you." Well, that wasn't stated in the contract, and I wrote and asked him if that wasn't right.

Q. You wrote and asked him and that was your business up there, to get your paper?

A. Yes, sir.

Q. You went to Kansas City, now, to have him to deliver back your cattle paper, because you had delivered all the cattle you had or that you could find on the range?

A. No, sir, no, sir.

112 Q. Well, you say you did write a letter to Major Drumm. When did you write that letter?

A. If you have got it there, it will tell the date.

Q. Is that the letter?

Counsel hands witness letter.

A. Yes sir, that is the letter. I believe so. I think it is.

By Mr. YOUNG:

Q. If your Honor please, I desire to have the witness read this letter as a part of his testimony.

By Mr. SWINDALL: We object to it as incompetent, irrelevant and immaterial.

By the COURT: I don't know what it contains.

By Mr. SWINDALL: What is that, your Honor?

By the COURT: I don't know what it contains.

By Mr. SWINDALL: Well, there might have been a part of the contract left out.

By the COURT: The court knows nothing about the contents of it.

By Mr. SWINDALL: Yes sir. Well, we object as incompetent, irrelevant and immaterial.

By ERSKINE SNODDY: He wants to see the letter.

By Mr. YOUNG: It is a question of carrying out this contract, is what we are driving at, whether his intentions were ever to carry out—carry it out; it is one of the contentions in issue in this case.

By the COURT: For what purpose is that competent at all?

By Mr. YOUNG: This letter was written November 24, '99, upon his return home.

By the COURT: Yes sir.

By Mr. YOUNG: This is competent to show that when he did return home he expected to deliver, he expected to deliver what cattle he did have to deliver, and that he went to Kansas City with what he

did deliver and insisted upon having his paper turned over, and after that——

113 By the COURT: He says in his opening statement just exactly what he says in that letter, just what he stated in that letter, and it wasn't put in there, so what is the difference about that letter?

By Mr. YOUNG: Well, it confirms his actions.

By the COURT: He has already stated that on cross examination. It is the same exactly in substance and cannot cut any figure here at all because he agrees that was his understanding about the matter. The fact that he wrote the letter wouldn't change the subject at all, unless the contract was changed, and I suppose you don't understand it was.

By Mr. YOUNG: No, the contract wasn't changed.

By Mr. SWINDALL: The proposition is this: After that letter was written——

By the COURT: There is no use arguing about it, gentlemen, I have ruled. The witness has already given his version of the contract, just exactly as stated there in that letter, so what is the difference, what is the use of taking up time with it.

Q. Now, as a matter of fact these cattle were shipped to Kansas City, after that you came back home. And you say Mr. Bryson was to come back with you?

A. Yes sir, that is what Mr. Bryson told me.

Q. But that he didn't go back with you?

A. Well, Major Drumm told me that morning he would send Bryson right back to get the cattle.

Q. Now, did you deliver any cattle to Mr. Gober yourself?

A. No sir.

Q. You didn't see Mr. Gober take any cattle out of your pasture?

A. No sir.

Q. Never did?

A. I never saw Mr. Gober take any.

Q. Now, these cattle—how long did you keep these cattle that you say you had in that small pasture when you went up there,

114 how long did you keep them in that pasture?

A. Well, sir, I wouldn't remember the exact dates, but some three or four weeks, is my recollection now.

Q. How these cattle got into anybody else's pasture before January 1, 1900?

A. Well, I don't know that date that he got there.

Q. Well, but I am asking you——

A. If they had strayed out——

Q. If they had strayed out, if they had strayed out, you would just know they had strayed out?

A. Oh, no sir.

Q. Now, you spoke about being at a round up later on, some time in January or the last part of December, or the first of January, 1900, where was this round up, in whose pasture?

A. That round up, I ain't positive about the date of that Mr. Young, but it was——

Q. Well, give the jury your best recollection of it.
A. It was in January.
Q. In January?
A. Yes sir, over in Mr. Gober's pasture.
Q. Who was present at that round up?
A. Well, I couldn't tell all the men. Mr. Gober, Mr. Jones, Mr.—well, Gober's right hand man, I don't know, I forget his name——
Q. Well, the jury don't know anything about his right hand man. Give the name.
A. Well, one of his gun carriers.
Q. Well, sir, I would like for you to state his name.
A. Wade Buey.
Q. Where is Mr. Wade Buey?
A. I don't know nothing about him. Mr. Caps man knew him.
115 Q. Mr. Reenstone there?
A. Reenstone was there.
Q. Now, how many cattle were in that round up that day?
By the COURT: You mean, all told or just his cattle?
Q. I mean in the round up, how many cattle were rounded up that day from which these cattle were cut?
A. I suppose that is the seven hundred head, Mr. Young.
Q. Was there anybody else cutting cattle out of this round up except Gober?
A. The headquarter men was.
Q. That is, Chapman and Morris?
A. No, Morris and Maxwell.
Q. Morris and Maxwell? They were cutting some cattle out?
A. Yes sir.
Q. Now, how many cattle did Gober take away from that round up, if you know?
A. I don't know, sir.
Q. Got any idea?
A. Well, looked to me like two or three hundred head.
Q. Two or three hundred head?
A. Yes sir.
Q. Now, Mr. Edmisson, don't you know that you and Reenstone counted those cattle Mr. Gober got?
A. I know we didn't.
Q. And he only got between thirty and thirty-five head, thirty three head of cattle that day?
A. I know it is positively not so.
Q. You know it is positively not so?
A. Yes sir, I do.
Q. Do you know he got three hundred head out of that herd that day?
A. No sir, I only made an estimate.
116 Q. Was the cattle all cut—did you stay there to get—to see the cattle all cut out?
A. Well, they claimed so, I wasn't permitted to ride into the herd,

Mr. Gober stayed on one side of me and Mr. Jones on the other side with their guns to keep me — going in their herd.

Q. Well, you never did at any time tender Mr. Gober any cattle?

A. No sir, I never.

Q. Now, you placed a lot of these cattle, didn't you, at different places. I mean, after this shipment was made to Kansas City, state to the jury where you placed these cattle.

A. I never placed any cattle at all after Mr. Gober come and taken them cattle out of my pasture, except a few calves that had been on feed for some time after I delivered Mr. Bryson's cattle, that I told Mr. Bryson about when he was there.

Q. Did you take a lot of cattle down in Day County or one lot down there, about eighteen head?

A. In Day County?

Q. Yes sir.

A. Never was in Day County.

Q. Dewey County?

A. To Seiling?

Q. Yes sir.

A. Yes sir, we sent some down there.

Q. How many head did you send down there?

A. I think about sixteen or eighteen head, they wintered over to my old place, where I had fed them the winter before, and I had just taken them over on to feed.

Q. Mr. Gober got them, didn't he?

A. Yes sir, he asked me where they were and I told him.

Q. Where was another bunch placed?

A. Another bunch with Mr. Fuller.

117 —. How many head?

A. I think probably twenty head may be, pretty near.

Q. What became of them?

A. Mr. Gober went and got them, I suppose.

Q. Well, where was another bunch?

A. Mr. Enfield's place.

Q. How many were there?

A. I think twelve head that they got down there, but they didn't belong to them.

Q. What kind of stuff was that?

A. That was some motherless calves that old man Holman had given to my wife, and belonged to her, and a few that was branded A D that I had contracted to John Hogue as soon as I could get them released from the Commission Company, and when we got into that delivery business they never was released.

Q. Those calves were out of this mortgaged cattle?

A. No sir.

Q. Out of the X-2-Bar cattle?

A. No sir, you ought to know, you paid for them.

Q. The mothers was covered by the mortgages, wasn't they?

A. No sir.

Q. Well, how did they have anything to do with the delivery of these cattle?

A. I didn't say the B S's did.
Q. I am talking about the A D's.
A. The A D's was out of the X-2-Bar cattle.
Q. The A D's were out of the X-2-Bar cattle?
A. Yes sir.
Q. You had branded them and sold them to Mr. Hogue?
A. Who?
Q. Mr. Hogue?
118 A. I had contracted to sell them to him whenever I could get them released from the Commission Company.
Q. What became of those calves?
A. Mr. Gober got them.
Q. Well, he got them about the same—he got them some time after this delivery was made, didn't he?
A. He got them in April.
Q. Was there any other?
A. That is all I know about.
Q. That took all the cattle you owned on the range, didn't it?
A. That taken all the cattle—you mean, Gober got all the cattle?
Q. Now, I say when you placed these different cattle around in these different bunches that took all the cattle you had left on the range?
A. These cattle had strayed out of these pastures, Mr. Young, and was out being herded and I was out looking after this outside cattle to keep them from being destroyed or wasted, so I could——
Q. Was there any cattle left on the range that winter?
A. Oh yes, cattle died there.
Q. That belonged to you?
A. That was in this brand.
Q. That is what I mean, in this contract?
A. Yes sir.
Q. Cattle that remained there on this range, different parts of it, all winter?
A. Yes sir, there was cattle there all winter.
Q. How many head?
A. Well, sir, I couldn't tell how many there was in Mr. Gober's pasture, I don't think he cleaned them all out of there, and there was quite a lot of them in the west end, southeast end of the pasture, probably three or four or five hundred.
119 Q. That remained there all winter?
A. Well, I don't know about how long they stayed there.
Q. Well, when did you see them there last?
A. Seen them there after the delivery was made in the Fall.
Q. Why didn't you take them?
A. They was on the pasture on grass. They wasn't being herded, they wasn't in the herd law country, that was considered free range there, and after they got east it was herd law country, and south.
Q. Now, after you and Mr. Bryson went to Kansas City, you and Mr. Bryson made two trips to Kansas City, didn't you.
By the COURT: Before you go on to that, let me get the numbers in these small bunches.

A. I ain't positive, I think about eighteen at Mr. Albright's.
By the COURT: And where else?
A. And, I think probably twenty at Mr. Fuller's.
By the COURT: Yes sir, Mr. Fuller's and twelve or thirteen at Enfield's.
By Mr. YOUNG: At where?
A. Enfield's.
Q. Now, what did you tell Mr. Enfield about those cattle you left there with him, who did you tell him owned those cattle?
A. Mr. Enfield?
Q. Yes sir.
A. Well, I didn't tell him, as I know of.
Q. Did you write him a letter and notify him who to deliver those cattle to when they were called for?
A. No sir, never said, never told him anything.
Q. Never told him?
A. He wanted to trade for a couple of calves there was there, and I told him that they belonged to Sam Harris, my brother in
120 law.
Q. Belonged to Sam Harris? Well, did they?
A. Yes sir, I had traded him two calves for a milk cow?
Q. Now, you say in June or July—well, I want to ask you, Mr. Edmisson, you never had anything more to do with these cattle after that time? What time did you quit looking after these cattle, driving them about, exercising any ownership over them?
A. Well, that was in now, you mean those cattle that belonged to the company, that the company claims?
Q. Those cattle in controversy?
By the COURT: The cattle that were mortgaged by you?
A. Well it was in January, I think after Mr. Gober came and got them.
Q. You never had anything more to do with them after that?
A. I don't think I did unless it was this bunch I put on feed at Seiling, at the old home place.
Q. Now, Mr. Gober, you say, gathered up all these cattle and turned them into his premises?
A. I don't know that he turned them in there, I don't know where he turned them, that is the trouble.
Q. Well, but you know he put what he had in an adjoining pasture to this—in his pasture, didn't he?
A. He put some cattle in there, yes sir, next spring.
Q. How many did he put in there, how many cattle did he have in there of this brand?
A. Of this brand?
Q. Yes sir.
A. I counted five hundred and seventy-five head, I think.
Q. Five hundred and seventy-five head?
A. Yes sir.
121 Q. This was in July or August, 1900?
A. Somewheres along in the middle of the summer.
By the COURT: Five hundred and what?

A. Five hundred and seventy-five.

Q. Now, that is all the cattle you ever saw in Gober's pasture in this brand?

A. Well, that is all I counted in that pasture.

Q. And those included the different bunches he had gotten around at the—at these different places?

A. It included all but a few unbranded calves. I never did see them in there.

Q. Now, you stated that you counted these cattle down here in Gober's pasture in July or August. You testified in relation to this matter a short time ago at Liberty, Missouri, Mr. Gober, or Edmisson, excuse me, I should say?

A. Yes sir.

Q. I will ask you if you didn't testify that that was in May that you and Mr. Guthrie made that tally?

A. No sir, I don't think it was.

Q. And I will ask you if you didn't testify that there was five hundred head instead of five hundred and seventy-five?

A. No sir, I never made that statement.

Q. Now, you and Mr. Guthrie went down into Mr. Gober's pasture and went on to the creek. Where did you start in, what part of the pasture?

A. We started in at the upper side of the pasture, I mean, up the creek.

Q. How long is this creek in this pasture?

A. Well, I suppose it is—the creek run through the pasture three miles.

Q. Now you say you started in there about nine o'clock?

A. Well, it was up in the day, after the sun got up hot,
122 warm.

Q. You commenced finding cattle as soon as you got in?

A. Yes sir.

Q. And commenced to count them. Was there any other cattle in there except the ones of your brand?

A. Yes sir, there was other cattle in there?

Q. What other brands?

A. Well, there was some T V's there.

Q. About how many T V's?

A. I didn't count them.

Q. Well, estimate them?

A. I couldn't estimate them, as I——

Q. It would be a hard matter for a man to estimate about how many T. V. Cattle were in that pasture?

A. Well, it would unless you were paying some attention to them.

Q. Well, you have been in the cattle business a long time, haven't you, Mr. Edmisson?

A. Quite a while.

Q. Well, can a man make any estimate of a bunch of cattle by just riding through and seeing a part of one kind and a part of another, with any accuracy whatever?

A. Yes sir.

Q. How can he do it?

A. Well, just by looking; a man can make an estimate of the most of them.

Q. By seeing them all in a bunch?

A. Well, not all in one bunch, but strung out.

Q. Suppose you were estimating men with different colored eyes in the room, how would you do that?

By the COURT: I suppose that is not material.

Q. You say you started in about nine o'clock, you say the cattle came on the creek about that time for water?

123 A. Yes sir.

Q. You didn't round up the cattle?

A. No sir.

Q. Didn't cut out all the different brands?

A. No sir.

Q. Just rode down the creek?

A. Went down and back up the creek.

Q. How many trips did you make up and down the creek?

A. Went down once and came back to where the creek forked there, and went up both creeks.

Q. Then you may have missed a lot of the cattle, wouldn't you?

A. Why, yes sir, I may have done so. I never saw all of them because——

Q. The cattle where you first went on the creek, that was about nine o'clock, cattle generally come in about noon, don't they?

A. They commence coming in about nine o'clock in the summer time and stay there until five or six o'clock in the evening, and then they commence going out on the flat.

Q. Now, Mr. Edmisson, do you mean to tell the jury that your count of those cattle there, five hundred and seventy five would be a count that was satisfactory to you for any purpose?

A. Yes sir I would think.

Q. Would you buy those cattle on that count?

A. I would take them for that many.

Q. How—did you keep a tally of them as you went through?

A. Yes sir.

Q. In a book?

A. Rope.

Q. Had a rope, did you?

A. Yes sir.

Q. Have you got that rope now?

A. I think that is wore out.

124 Q. You never put it down in a book at all?

A. Yes, sir, I think I did.

Q. Where is the book?

A. At home, I guess.

Q. Do you know of any of these cattle being taken away from Mr. Bryson at Curtis for taxes?

A. No, sir, I don't know of my own knowledge.

Q. Did you notify the sheriff that the cattle were being moved that caused him to make this levy on these cattle?

A. Yes, sir.

Q. And you told the sheriff that all the cattle that were in this brand were going out, didn't you?

A. No, sir.

Q. Well, the sheriff don't usually, when cattle are shipped off the range, unless all are going to be shipped, make a levy?

A. Whenever they know the cattle are going to be shipped, then they make a levy.

Q. You notified the Woodward County sheriff and also the Woods County sheriff?

A. I don't think I notified the Woods county Sheriff.

Q. The Woods county sheriff levied on a number of these cattle, didn't he?

A. I don't know.

Q. You don't know how many he levied on at Curtis?

A. I do not.

Q. Now, about the market value of these cattle, Mr. Edmisson, what was it you said you thought it was?

A. I was offered twenty-five dollars a head for just such cattle as I shipped to you fellows.

Q. When?

A. Just on the shipment before, and you fellows returned me fifteen dollars a head at Kansas City, and I was offered twenty five dollars a head before I shipped them.

125 Q. Who offered you that?

A. Mr. Tandy's man.

Q. Twenty-five dollars all around?

A. Twenty-five dollars for that bunch of cattle.

Q. Cows and calves and everything?

A. Oh, no, there was no calves amongst them.

Q. Well, in valuing a bunch of cattle that way, if there is nothing said about the calves what becomes of the calves? Are they thrown in?

A. I don't know of any case of that kind.

Q. Well, is it a custom in the country that where a man buys a bunch of cows, for instance——

A. Well, he offered for all of them so much with the calves throwed in or so much throwed out.

Q. Well, now, how was this offer you say you had?

A. That was dry cows.

Q. No calves in the bunch?

A. There was six or eight calves got in. They followed up but they wasn't included; they wasn't to go.

Q. They wasn't to be counted?

A. No, sir, they wasn't to go. Just for the cows.

Q. What kind of cattle was it you claimed these people got of you, these three or four hundred?

A. Sir?

Q. What class of cattle?

A. That Drumm-Flato got of me?

Q. Yes?

A. Well, sir, there was three fourths of them that were good native cattle and about a fourth are southern cattle. There was at least a few of those cattle that were Missouri stock. I raised the stock from Missouri cows.

Q. South Missouri stock?

126 A. Yes, sir, shipped them to Evansville, Kansas, and then drove them down there.

Q. You don't know how many calves were among them?

A. No, sir, I do not.

Q. Nor how many heifers, yearlings, steers?

A. No, sir.

Q. You don't know how many cows?

A. I told you I didn't know.

Q. Nor how many bulls?

A. No, sir.

Q. Had any of these cattle when you saw them down here in Gober's pasture, been rebranded by Mr. Gober?

A. Don't know who branded them.

Q. Well, was there a new brand on them, a tally brand?

A. There was a new brand on, I reckon, the most of them, may be all of them.

Q. What was that brand?

A. Well, I wouldn't know what to call it, unless it was Lazy X.

Q. Lazy X? On what part of the animal?

A. Well, it seems to me on the shoulder ain't positive about that, though.

Q. Now, when you examined them down there that day to count them, did you see all the cattle that had your brand on them?

A. Yes, sir; didn't count anything else.

Q. You didn't see any other brand?

A. Yes, sir, there was other brands, a few; I disremember what they were.

Q. You think about six hundred head, all told, in the pasture?

A. Might have been a few more than that.

By Mr. YOUNG: I believe that is all, your Honor.

127 Redirect examination by CHAS. SWINDALL:

Q. Now, Mr. Edmisson, you spoke of these cattle that was there at Enfield's, two of them being calves your wife traded to Sam Harris. Were these her calves, were they?

A. Yes, sir.

Q. What was her separate brand of cattle?

A. B. S.

Q. G. S. or V. S.

A. B. S., yes, sir.

Q. Now state how many cattle you had there? At Enfield's, of your own, that was taken away by Gober?

A. Of those——

Q. X-2-Bars, J. W. whatever brand you had there.

A. I don't think of any except those A. D. calves, you know.

Q. Well, how many of those, the court took the number a while ago, but I want to get it correct. How many of those?

By the COURT: How many did Gober get out of those bunches?

A. Well——

By Mr. SWINDALL: That is what I am trying to get, what Gober got that belonged to Sam Harris.

A. There was three or four of those A. D. cows and the rest belonged to Sam Harris.

By the COURT: You are getting a good many brands that the jury will know nothing about. How many did Gober get of your cows?

A. He got all that—all the cattle, and he paid for these cattle that belonged to my wife afterwards.

By the COURT: Well, now, how many did he get of you?

A. He got four, I think at Enfield's, may be only three.

By the COURT: You say four at Enfield's, instead of thirteen?

A. Yes, sir.

By the COURT: Well, now then, how many at Albright's?

128 A. I think eighteen or twenty.

By the COURT: How many at Fuller's?

A. He got about twenty head, I disremember.

By Mr. SWINDALL: I thought your Honor got it wrong.

By the COURT: I didn't get it wrong. I got just what he stated. That all with this witness? Stand aside. Call your next witness.

By Mr. SWINDALL: John McFadden.

Witness Edmisson excused from stand.

JOHN F. MCFADDEN.

JOHN F. MCFADDEN, called as a witness on behalf of the plaintiff in the above entitled case, being first duly sworn, testified as follows:

Direct examination by CHAS. SWINDALL:

Q. State your name to the court and jury.

A. J. F. McFadden.

Q. Where do you reside?

A. I live in Woodward County.

Q. How long have you been residing in Woodward County?

A. About four years.

Q. Are you acquainted with the plaintiff, R. C. Edmisson?

A. Yes, sir.

Q. Were you acquainted with James R. Gober, the gentleman representing the Drumm-Flato Commission Company there in gathering some cattle in 1900?

A. Slightly.

Q. State whether or not you are acquainted with Mr. Edmisson's brands of cattle, the brand he had there at that time in 1900?

A. I saw these X-2-Bar and 55 cattle.

Q. State what ear mark these cattle had, if you know?

A. The X-2-Bar's were ear marked cropped left and under half crop the right; the 55's I don't remember.

129 Q. State whether or not you ever saw any of these X-2-Bar cattle and 55 cattle in Mr. Robert's pasture, Mr. Gober's?

A. Yes sir, I saw them in his pasture.

Q. When was that, when you first saw them in his pasture? About the date as near as you remember.

A. Along the first of May I think, to the tenth of May, 1900.

Q. State how long they remained in that pasture at that time.

By Mr. YOUNG: You- Honor, I can't see the relevancy of this proposition, unless they can show this gentleman was the agent. He might have seen the cattle in the pasture——

By the COURT: Oh, that is only one circumstance, who was controlling the cattle at that time. They were in Mr. Gober's pasture?

A. They were in Mr. Gober's pasture, the pasture known as the Gober and Chapman pasture, under the control, I suppose, of Mr. Gober.

Q. Did you see Mr. Gober's employees with them?

A. Yes sir, I saw his men working with them.

Q. How many head of cattle did you see there in Mr. Gober's pasture with his men in May, 1900?

A. Of this brand of cattle?

Q. Yes sir.

A. My estimate would be about five hundred and seventy-five.

By Mr. YOUNG: We object, your Honor, to his estimate.

By the COURT: Wait a minute; there is an objection here to the witness estimating. I suppose that he made an estimate, some sort of a count that gives him a sort of an idea. The weight of it, however, is with the jury. Give me this witness's name.

By Mr. SWINDALL: John F. McFadden.

Q. State how come you to be looking at this brand and mark on these cattle at that time?

A. I was looking for some grass, and drifting through that part of the country, I run on to this bunch of cattle directly after
130 they come off from feed. The X-2-Bar cattle were branded in my ear mark which directed my attention to them particularly. They were bunched, just had been turned loose. I rode through them and examined them, looking for my interests.

Q. State when at any time after that you saw any cattle in Mr. Gober's pasture, any of these cattle I mean, these X-2-Bars and 55 cattle.

Q. I attended a round up right on this same ground the last days, I think, of June, somewheres, or the first days of July, 1900, that summer.

Q. You see any of these X-2-Bar cattle and 55 cattle there then?

A. Yes sir.

Q. State what they were doing with these there at that time or any part of them?

A. They was rounding up there that day, and I was notified there was such to be. I was there. Mr. Gober with his men was cutting some of these X-2-Bars and 55 cattle, preparatory to shipping them.

Q. Did you have any conversation there with Mr. Gober, there

that day, as to the number he was going to ship of the X-2-Bar and 55's?

A. No sir, I didn't.

Q. Now how many—approximate the number of X-2-Bar and 55 cattle there were in that round up.

A. They looked to me about the same bunch of cattle, about the same range, on the identical ground I had once before saw them.

Q. About the same number, five hundred and seventy-five head?

A. Yes sir.

By Mr. YOUNG: Objected to as leading.

By the COURT: Oh, yes, objection sustained and answer stricken from the record.

Q. Well, about how many head would you estimate were there at that time?

131 By Mr. NOAH: I think that is incompetent.

By the COURT: If he knows, he may state.

A. I don't know, only my estimation. I didn't count the cattle.

Q. Well, did you arrive at them sufficiently to make an estimate of the number?

A. I worked there at the cattle that say, worked there at the round up.

Q. Worked there at the round up and helped cut out the cattle?

A. I didn't do any cutting, I stayed between the round up and the cattle.

By the COURT: State what you did.

A. I stayed between the round up and the cattle and assisted in that work.

By the COURT: Now, if you know how many cattle there was, you may state.

A. Positively, I don't; only an estimation.

Q. What was your estimation of the number there.

By Mr. NOAH: That is objected to as incompetent.

By the COURT: Have you made an estimate sufficiently correct so you can state how many there was there? If so, you may state; otherwise not.

A. That is my estimation of the cattle there was there both times, that is the only times I saw them together.

Q. Well, about how many head?

A. About five hundred and seventy-five is my estimation.

Q. State whether or not you noticed any tally brand on these cattle?

A. They were branded with a tally brand, or a fresh brand, placed on that spring or winter some time.

Q. What kind of a brand was it, if you know?

132 A. Well, it was an X laying down, sleeping or lazy, placed on the left shoulder, right behind the left shoulder.

Q. What is known as a sleeping or lazy X brand is it?

A. Yes, I suppose you would call it that.

Q. Were you acquainted with the market value of that class of cattle in that vicinity along in December and January, 1900, December, 1899, and January, 1900?

A. Why yes sir.

Q. How long have you been in the cattle business?

A. About twenty-six or seven years.

Q. Yes sir. Now, state what the market, what the nearest market was to where those cattle were at along in January and December, December 1899, and January, 1900? That is, the nearest railroad market, shipping point?

A. Well, I would think twenty dollars.

By Mr. YOUNG: We move that the answer be stri-ken from the record as not responsive to the question.

Q. I don't think he understood the question. What was the market value—I mean, what was the market the nearest to where these cattle were held, what shipping point, what shipping point did they ship from?

By the COURT: Wait a minute. Which was it you want withdrawn?

By Mr. NOAH: The answer of the witness.

By the COURT: The question was so strung out I didn't know what he wants to get at. The last answer objected to will be excluded.

Q. State what cattle of that kind were worth in the market there, nearest the place where the cattle were held, per head?

By Mr. YOUNG: That is objected to as no predicate had been laid.

By the COURT: Go on, answer the question.

By Mr. YOUNG: To which we except.

A. Twenty dollars.

By Mr. SWINDALL: Cross examine.

133 By the COURT: Cross examine, gentlemen.

Cross-examination by O. G. YOUNG:

Q. Mr. McFadden, what time was it you say you first saw these cattle in Gober's pasture?

A. It was the first of May, somewheres about the 7th to the tenth of May, 1900.

Q. Had the cattle shed off then, so the brands could be designated?

A. No sir.

Q. Long hair still on the cattle?

A. Yes sir.

Q. Were all the cattle in that pasture branded in this X-2-Bar and 55?

A. That day I didn't see any other cattle only the 55 and X-2-Bar.

Q. There was another, you observed no other brands on the cattle at that time, cattle branded with any other brand?

A. No sir, my attention was called directly to these cattle by the ear mark. I didn't know the cattle at that time. Most particularly to the ear mark, the ear mark being my own that was on these X-2-Bar cattle, and the fresh brand, that is the cause why I discerned the brand of X-2-Bar.

Q. Now you say you rode through these cattle?

A. Yes sir.

Q. Were they on the creek or up on the flat?

A. They were on the school section on a little flat; most of them were laying down when I rode up to them.

Q. And you particularly noticed the brands and the ear mark?

A. My attention was called to the ear mark most particularly, and of course my ear mark being the same, I rode around and looked at them, at that brand individually.

Q. What was your idea—did you estimate the number of cattle at that time when you were going through them, or did you estimate them since?

134 A. No, sir, at that time I made an estimate of the bunch of cattle. I was looking for a range to place a bunch of cattle and this particular place I had been directed to and went there and expected to find the country open, and when I got there to this particular point, I run on to these cattle.

Q. What was your object for going and getting a count or tally on the cattle?

A. As I stated before, I was looking for a place to place a bunch of cattle, I had a bunch of about four hundred and thirty odd head of cattle, and I was wanting grass for them, and I had looked over the Territory there and there was a question whether or not there was enough grass for those cattle and mine.

Q. There was how many cattle all told in that pasture?

A. This was almost all the cattle in that pasture.

Q. That was all the cattle?

A. Yes, sir.

Q. It took in the whole bunch?

A. The size of this pasture is three or four miles square, something like that.

Q. The size of the pasture is three or four miles square; now, will you state to the jury, Mr. McFadden, all of these cattle that were in there were branded with the X-2-Bar or 55's?

A. Oh, there might have been cattle there of other brands, but that was the bulk of the cattle.

Q. About how many cattle were there there in that brand that you estimated?

A. I don't remember of noticing any cattle outside of these whilst there was cattle, I didn't notice they had any brand on. I was looking for cattle that had my ear mark.

Q. Did you see any cattle branded T V ?

A. I don't remember of any.

135 Q. Did you see any cattle branded there with a lazy H?

A. Lazy H? I run that brand myself. No, sir. I didn't see any.

Q. Mr. McFadden, you were not a witness in this case at the other trial?

A. No, sir, didn't know anything about it. That is, about the case.

Q. How does it happen you are a witness now?

By Mr. SWINDALL: Objected to as incompetent.

By the COURT: Oh, if he knows, he may answer.

A. I presume my presence at this round up there, Mr. Edmisson knowing I was there, called him to approach me about it.

Q. Did Mr. Edmisson talk to you about this since that time?

A. He asked me some time back ago if I would come to Alva here at his next trial and tell them what I saw or knew about these cattle.

Q. Well, why did you put this number at exactly five hundred and seventy-five?

A. I met a party, a rider, possibly a mile from this bunch of cattle, and we were talking about the range and grass and I told him my business, stranger to me, and I was a stranger to him, and I asked him if he could tell me where a nook was down there—supposed to be a section of country enclosed, with one end wasn't closed, or a neck I think he called it, and he said he guessed I was in it. He stated there was a bunch of cattle throwed in there that day of that number.

Q. Of that number?

A. Of that number.

Q. So that is the way you arrived at the number of cattle there was in that bunch?

A. No, sir, not particularly. I went right straight to the cattle, because he told me where they were, and I looked at the cattle and my estimation of them was he was correct, there was that many cattle there.

Q. But that to you was—what makes you think there was five hundred and seventy-five head was what this fellow told you?

136 A. No, sir. I expected to see a pretty good sized bunch of cattle, and I found them.

Q. You say your purpose was to investigate a range and the number of cattle on the range—these were all the cattle that were on the range?

A. That is all the cattle that I saw there.

Q. About how many sections were there in this pasture?

A. Why, I would estimate that there was possibly four and a half or five sections.

Q. Four and a half or five sections?

A. Yes, sir.

Q. Did you see Mr. Gober down there at that time?

A. No, sir, I never seen Mr. Gober at that time.

Q. You never seen any of these cattle in Mr. Gober's pasture, in his possession at any time, did you?

A. Only in this pasture, I seen them, that bunch of cattle he cut out.

Q. Well, was it his pasture you were going to rent?

A. At that time I was directed to this point it was claimed there was a gap in there, and I went down looking to see some parties who had told me that by going in and by running a fence from a certain fence to a certain fence I could find sufficient grass for my bunch of cattle.

Q. Then this wasn't fenced, wasn't in fence at all, it was open?

A. I found when I got in there Mr. Gober had this pasture. Told me it was vacant.

Q. You never went to see Mr. Gober about it?

A. No, sir, I never saw any one.

Q. Did you know Mr. Gober was gathering these Edmisson cattle?

A. I wasn't in the country at that time, right at that time; I didn't know they were Mr. Edmisson's cattle, nor at the time
137 of the round up the last of June or the first of July, I didn't know they were Mr. Edmisson's cattle.

Q. When did you leave, Mr. McFadden?

A. Last days of April.

Q. 1900?

A. Yes, sir.

Q. So you know nothing about the cattle prior to that?

A. No, sir.

By Mr. YOUNG: That is all.

By the COURT: Stand aside.

By Mr. SWINDALL: That is all, Mr. McFadden.

Witness excused from the stand.

By Mr. SWINDALL: Gid Wilkinson.

GID WILKINSON.

GID WILKINSON, called as a witness on behalf of the plaintiff in the above entitled case, being first duly sworn, testified as follows:

Direct examination by CHAS. SWINDALL:

By the COURT: Gentlemen of the jury: We will take a five minute recess at this time. During the adjourned time or the recess, you will remember the admonitions the court has heretofore given you.

Here a recess was taken by the court.

After recess, the trial of the above cause was resumed. Jury all present. Counsel for plaintiff and defendant present.

By the COURT: Proceed, gentlemen.

Q. State your name to the court and jury.

A. Gid Wilkinson.

Q. Where do you reside Mr. Wilkinson?

A. South of Quinlan.

138 Q. How long have you resided at the place you now reside?

A. Between nine and ten years.

Q. Are you acquainted with the plaintiff, R. C. Edmisson?

A. Yes, sir.

Q. Are you acquainted with Mr. Bryson, J. F. Bryson, who was there in 1899 gathering some cattle?

A. No, sir, I am not acquainted with him. I seen him one time.

Q. State whether or not you resided in the old, Smith-Maxwell and Morris pasture?

A. Yes, sir.

Q. What part of the pasture do you reside in?

A. West part.

Q. State whether or not that was the pasture in which Mr. Edmisson was holding his cattle in 1899?

A. Yes, sir.

Q. State whether or not you know of the time that they had a round up in the latter part of November or December, 1899, at the time Mr. Bryson took some cattle of Edmisson's?

A. Yes, sir, I was at the round —.

Q. You was at the round up?

A. Yes, sir.

Q. State whether or not you ever saw any of Mr. Edmisson's cattle in the west end of this pasture after that round up and delivery to Mr. Bryson.

By Mr. NOAH: We object as incompetent and immaterial.

By the COURT: In which pasture was that?

By Mr. SWINDALL: That was in the west end of the Smith-Maxwell-Morris pasture, the same pasture in which Edmisson held his cattle, one big enclosure and several other little pastures in it.

By the COURT: I don't think it is competent to show that.

139 If you want to trace the cattle to Gober's hands you may do that.

By Mr. NOAH: They claim there wasn't any cattle turned in there, the defendant.

By Mr. SWINDALL: They claim there wasn't any cattle turned in there. They claim in their opening statement here, at the time Mr. Bryson took these cattle to Kansas City, there was no other cattle left there.

By the COURT: That will be for you to show when you get to that. It certainly is incompetent now. What you want to do is to trace the cattle into the hands of the defendant, the defendant's agent.

Q. State whether or not you ever saw any cattle in the possession of Mr. Gober, of these Edmisson cattle, after this delivery to Bryson, in Gober's pasture?

A. I don't believe I was in Gober's pasture after this delivery.

By Mr. SWINDALL:

Q. I suppose the other part of his testimony won't be relevant until rebuttal.

By the COURT: Not at all.

By Mr. YOUNG: That is all. We have nothing to ask.

By the COURT: Stand aside. What was this witness's name?

By Mr. SWINDALL: Gid Wilkinson.

Witness excused from the stand.

By the COURT: Call your next witness.

By Mr. SWINDALL: Ely Roberts.

140 ELY ROBERTS.

ELY ROBERTS, called as a witness on behalf of the plaintiff in the above entitled action, being first duly sworn, testified as follows:

Direct examination by CHAS. SWINDALL:

Q. Where do you reside Mr. Roberts?
A. Oh, about two miles south of Quinlan; mile south, mile west.
Q. Are you acquainted with the defendant, R. C. Edmisson, plaintiff in this case?
A. Yes sir.
Q. I mean, the plaintiff, R. C. Edmisson, in this case?
A. Yes sir.
Q. Were you acquainted with him in 1899?
A. Yes sir, along about the time they rounded the cattle, in November or December.
Q. State what if anything you know relative to the round up that was had there along in November or the first of December, 1899, and some cattle being delivered to Mr. Bryson.
A. I was with the round up about five or six days the last of November and the first few days of December, as near as I can remember the dates.
Q. State whether or not you saw this pasture or cattle as they were driven off to Curtis?
A. Yes sir, I did.
Q. Are you the same Mr. Roberts they spoke of in whose pasture those cattle were turned after they were cut out of the Edmisson pasture?
A. Yes sir.
Q. State what cattle you had in your pasture at that time?
A. I had about four hundred head.
Q. In that part of the pasture?
A. Yes sir. In our pasture.
141 Q. In your own pasture?
A. Yes sir, Harrington and mine.
Q. Harrington and yours?
A. Yes sir.
Q. State whether or not you went with these here cattle when they were taken to Curtis?
A. Yes sir, I did. I didn't go all the way, I went probably three quarters of a mile to Curtis.
Q. Any of your cattle in this herd?
A. There was a few, three or four head got mixed with them.
Q. Three or four head?
A. Yes sir.
Q. State whether or not you are acquainted with Mr. J. F. Bryson, the gentleman representing the Drumm-Flato Commission Company, the defendant at that time?
A. Had a short acquaintance at that time.
Q. Saw him there at that time, did you?
A. Yes sir.

Q. State whether or not this count of these cattle was talked of there at that time while they were driving these cattle to Curtis?
A. Yes sir.
Q. Did Mr. Bryson ever make any objection to the count of the cattle, or what these parties had said?

By Mr. NOAH: Wait a minute. We object to the form of the question.
By the COURT: Well, it is not competent to prove that at this time. Objections sustained. The court thinks it is unnecessary for you to put in rebuttal testimony at this time. You may not need it.

Q. State what was—what size herd of cattle there was there at that time?
142 A. That they drove to Curtis?
Q. Yes sir, of Edmisson cattle?
A. Why, I think there was somewheres in the neighborhood of sixteen or seventeen hundred head. That would be my estimate. I rode with them for about six miles, looking for my own cattle, and rode through them.
Q. About five or six was all of yours you found, of yours, that got in there, were turned into your pasture?
A. I think I found three after they left us, going on the way to Curtis.

By Mr. SWINDALL: That is all.

Cross-examination by O. G. YOUNG:

Q. You never counted these cattle, did you, Mr. Roberts?
A. No sir.
Q. Never saw them counted?
A. I saw them when they were counting. We threw a few back there and moved my cattle to the west side to cut them off, keep them from mixing them. I understood they were going to count, and saw them controlling the herd and supposed they were counting.
Q. Did your four hundred head of cattle mix with them that night?
A. I don't think they did very much. They cut some, probably, before I got there the next morning.
Q. Did they round up that herd and cut out any cattle the next morning?
A. I believe they did before I got there. They were moving——
Q. You know whose cattle were cut out that morning?
A. No sir, I don't; probably there was a few other cattle in the pasture besides mine, some strays.
Q. Was there any of the X-2-Bar's and 55's left in that pasture after that time?

By Mr. SWINDALL: That is incompetent, irrelevant and immaterial.
By the COURT: Oh, no, that is proper cross-examination.

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143 A. No sir, they were rounded up before, when they made this gathering at the time Mr. Bryson shipped.

Q. Well, there was two round ups about that time, wasn't there, Mr. Roberts?

A. I think there was only one of this first shipment of cattle.

Q. This first shipment of cattle? You know of any other shipment of cattle being made by Mr. Bryson at that time?

A. No sir.

Q. You don't know whether there was another, whether this was the first or second round up in November after all?

A. This was the first, that Mr. Bryson was there. That Mr. Bryson was there?

Q. Yes sir.

A. Yes sir.

Q. Did Mr. Edmisson come at that first round up with those cattle to Curtis at that time?

A. No sir.

Q. You don't know then of two round ups being made?

A. Well, there was others rounding but Mr. Bryson——

Q. I mean Mr. Bryson or Mr. Edmisson making two round ups of these Edmisson cattle?

A. No sir.

By Mr. YOUNG: That is all.

Redirect examination by CHAS. SWINDALL:

Q. You say you saw them counting the cattle there, Mr. Roberts?

A. Yes sir. I suppose they were counting them. They were at the gate and I could see——

Q. Could see cattle passing through the gate and men standing there at the gate?

A. Looked like they were counting to me.

144 Q. Was Mr. Bryson present there?

A. I think he was. He was there when I left the gate.

By Mr. SWINDALL: That is all.

By Mr. YOUNG: That is all.

Witness excused from the stand.

H. FULLER.

H. FULLER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by CHAS. SWINDALL:

Q. Where do you reside Mr. Fuller?

A. At the present time, I live seven miles southeast of Carmen, Woods County, Oklahoma.

Q. Where were you residing in November, 1899?

A. I was residing seven miles of this town, northeast, or here southeast I should have said.

Q. I mean in 1899, November, 1899?

A. The same place.

Q. Are you acquainted with Mr. R. C. Edmisson, the plaintiff in this case?

A. Yes sir.

Q. About how long have you been acquainted with him?

A. Well, for several years. I used to know him when I lived at Evansville, can't state just the number of years, but——

Q. State whether or not you were at his place in November, or the first part of December, 1899?

A. Yes sir I were.

Q. State whether or not—what if anything you know relative to a delivery of cattle being made there by Mr. Edmisson to Mr. Bryson?

A. I know nothing about that only what Mr. Edmisson told me.

Q. You know—state what if anything you know relative
145 to some cattle being rounded up there and held in Mr. Edmisson's small pasture after this delivery was made?

By Mr. YOUNG: He says he knows nothing about it except what Mr. Edmisson told him.

By the COURT: He is now asking if he knows anything about holding the cattle in the other pasture.

A. Well, sir, I and Mr. Edmisson rode out there to the smaller pasture, and I seen a number of cattle in that small pasture, I suppose between two and three hundred head, of Mr. Edmisson's cattle, x-2-Bar cattle.

By the COURT: When was that?

A. That was in November or December, '99.

Q. Was that after Mr. Edmisson had told you about the delivery to Mr. Bryson?

A. Yes sir, that was the time he told me he made a delivery to Mr. Bryson.

By Mr. YOUNG: Now, we object to that. That is hearsay testimony.

By Mr. SWINDALL: That is not hearsay.

By Mr. YOUNG: It is hearsay as to a material proposition, as to the time.

By the COURT: Oh, yes, I think so, gentlemen. It is a location of the time. It is locating the time by hearsay. You have no more right to locate time by hearsay than anything else. Sustained.

Q. What was the size of the pasture where you saw these two hundred and fifty or three hundred head of cattle?

A. Well, sir, I couldn't exactly say the size of it. It was some four or five sections.

Q. Where was it located relative to Mr. Edmisson's house?

A. It was located southeast, if I remember right.

Q. Southeast of his house?

A. Yes sir.

By the COURT: Your first name, Mr. Fuller, what do you say it is?

A. H. Fuller.

146 *A. H. Fuller.*

By the COURT: H.?

A. Yes sir, Hiram Fuller.
Q. How far from Mr. Edmisson's house?
A. Well, I couldn't say the distance. I suppose from three quarters to a mile.
Q. Can you remember the date that that was that you saw these cattle in there?
A. Not exactly to the day.
Q. You remember the month?
A. Yes sir.
Q. What month was it?
A. I think it was about the first of December.
Q. What year?
A. 1899.
Q. 1899, you mean?
A. How?
Q. 1899?
A. Or, 1899, it was.

By Mr. SWINDALL: That is all.

Cross-examination by O. G. YOUNG:

Q. You never counted these cattle did you, Mr. Fuller?
A. No sir, I just took them from approximation.
Q. Were they all bunched up?
A. No sir, they wasn't all in one bunch. They was scattered along different places.
Q. How large bunches were they in?
A. Oh, they was from twenty to thirty or forty, along there.
Q. What object had you in counting these cattle or estimating them?
A. I didn't count them.
Q. What object did you have in estimating them?
147 A. Well, sir, I had been with Mr. Edmisson, well, from the time he first went down there and before, working for them, and he was telling me about his settlement betwixt him and Mr. Flato.
Q. Now, you needn't state anything about the settlement.
A. All right, then, and he just asked me to go out with him and see his cattle.
Q. Did he ask you to count them or anything of that kind?
A. No sir, he did not.
Q. Did you tell him what you thought there was in there at the time?
A. No sir, I did not.
Q. When did you first tell him how many you thought there was in there?
A. I think right now is the first time I have ever told him.
Q. You mean, since you have been on the witness stand?
A. Yes sir.
Q. You hadn't told him before you got on the witness stand how many you saw?

A. No sir, not to the number in that pasture.

Q. You were not a witness at the trial of this case before, were you?

A. No sir, didn't know this case was going on until I happened in here and they caught me here.

Q. Were there any other cattle in this pasture except X-2-Bar's and 55's?

A. Yes sir, there might have been some other cattle in there, I wouldn't be positive to that.

Q. Do you know about how many other brands there were in there?

A. No sir, I don't know, I wasn't looking for them.

Q. Couldn't you give any estimate?

A. Well, I don't know as I could give an estimate, because I——

Q. You rode up close to these cattle, did you, and examined their brands?

148 A. No sir, nothing more than just rode through the bunches where they was, rode right through them, just the same as walking down through that hall amongst the men.

Q. Had no object except to look at the cattle?

A. That is all, sir.

Q. Now, you say this was about December the first?

A. Yes sir, to the best of my recollection.

Q. You were in there afterwards when these cattle were rounded up?

A. No sir.

By Mr. YOUNG: That is all, Mr. Fuller.

Redirect examination by CHARLES SWINDALL:

Q. State whether or not you were familiar with Mr. Edmisson's brand of cattle at that time?

A. Yes sir, I had been with them for two years, up to way before that, been with his cattle for two years.

Q. Yes sir, and your estimation of that herd was—it was from two hundred to——

By the COURT: Well, now, wait a minute. That is entirely leading. It is a vicious way of trying a case.

Witness excused from the stand.

By Mr. SWINDALL: We desire at this time to offer in evidence the deposition of E. F. Black. We desire first to read in evidence the contract between R. C. Edmisson and Drumm-Flato Commission Company, which has been offered and marked "Exhibit A." The contract reads as follows:—

Exhibit A. This Agreement, made and entered into this 22nd day of November, 1899, by and between Drumm-Flato Commission Company, party of the first part, and R. C. Edmisson, party of the second part,

Witnesseth, That said R. C. Edmisson, the second party, hereby agrees to deliver to Drumm-Flato Commission Company
149 nineteen hundred (1900) head of cattle as they run on the range, (provided the same can be found to make this num-

ber of head) of various ages and on which said Drumm-Flato Commission Company hold a chattel mortgage.

The parties of the first part agree, in consideration of the delivery of the above mentioned number of cattle, to deliver to said second party, R. C. Edmisson, all of his notes, mortgages and other indebtedness due said Drumm-Flato Commission Company to this date.

It is further agreed by the parties above mentioned that if Mr. Edmisson gathers as many as 200 head after the delivery to Drumm-Flato Commission Company of said nineteen hundred head of cattle, he is to turn over 100 head of the 200 gathered, or in case said Edmisson delivers to said Drumm-Flato Commission Company as many as two thousand head of cattle, any residue thereafter is to be retained by said Edmisson.

In witness whereof, We have hereunto set our hands the day and year above written.

R. C. EDMISSON,
DRUMM-FLATO COM. CO.,
Per A. DRUMM, *P't.*

By Mr. YOUNG: Just a minute. Two hundred is that?

By Mr. SWINDALL: Yes sir. "It is further agreed by the parties above mentioned that if Mr. Edmisson gathers as many as 200 head after the delivery to Drumm-Flato Commission Company of said nineteen hundred head of cattle, he is to turn over 100 head of the 200 gathered, or in case said Edmisson delivers to said Drumm-Flato Commission Company as many as two thousand head of cattle, any residue thereafter is to be retained by said Edmisson.

By Mr. SWINDALL: We now offer the deposition of Mr. Black, which omitting the caption, reads as follows:—

Here Mr. Swindall reads deposition of E. F. Black, which said deposition is in words and figures as follows:—

150 TERRITORY OF OKLAHOMA, *Woods County, ss:*

In the District Court of the Sixth District of the Territory of Oklahoma, Sitting in and for the County of Woods, November Term, 1903.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, a Corporation, Defendant.

Notice to Take Deposition.

The said Drumm-Flato Commission Company and H. A. Noah, attorney of record will take notice that on Monday, the 7th day of December, A. D. 1903, the plaintiff above named will take the depositions of sundry witnesses, to be used as evidence in the trial of the above cause in said Dist. Court, at the office of Samuel M. Garland, in the town of Lebanon, in the County of Linn, in the State of Oregon, between the hours of eight o'clock A. M. and six

o'clock P. M. of said day, and that the taking of the same will be adjourned and continued from day to day, at the named place and between the same hours, until they are completed.

SNODDY & SON,
TEMPLE HOUSTON,
D. P. MARUM,
CHAS. SWINDALL,
Attorneys for Plaintiff.

Service of the above notice is hereby acknowledged to have been made on me this 25th day of November, 1903.

BOTSFORD, DEATHERAGE & YOUNG,
H. A. NOAH, *Attorneys for Deft.*

151 In the District Court of the Sixth District of the Territory of Oklahoma, Sitting in and for the County of Woods, November Term, 1903.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, a Corporation, Defendant.

STATE OF OREGON, *County of Linn, ss:*

Deposition of witness taken to be used in an action pending in the District court of the Sixth District of the Territory of Oklahoma, sitting in Woods County, wherein R. C. Edmisson, is plaintiff and Drumm-Flato Commission Company, a corporation, is defendant, in pursuance of the notice hereto attached and at the time and place therein stated, the said plaintiff appeared by Samuel M. Garland, his attorney, and the defendant did not appear either in person or by attorney.

And thereupon, the said plaintiff produced the following witness, to wit, E. F. BLACK, of lawful age, who being first duly sworn, deposeth and sayeth in reply to the *the* interrogatories propounded:

Questions by Mr. GARLAND:

Q. State your name, age, residence and occupation.
A. E. F. Black, 33 years old, Lebanon, Linn County, Oregon. I am cutting wood at present.
Q. Please spell out your name in full.
A. Eldridge Forris Black.
Q. How long have you lived at your present place of residence?
A. Since a year ago last May.
Q. Where did you live just before coming to Oregon?
A. Woodward County, Oklahoma.
Q. How long did you live in Woodward County, Oklahoma, and in what part of the county?
A. About four years. Fourteen miles southeast of Woodward.

152 Q. What business did you follow there?

A. Cattle business, raising, buying, shipping, branding and range work of all kinds.

Q. How long were you engaged in the cattle business?

A. About fifteen years?

Q. What experience have you had in the cattle business?

A. All kinds, buying, selling, shipping, rounding up, cutting out various brands of cattle.

Q. State whether or not you were acquainted with Mr. R. C. Edmisson, the plaintiff herein, during your residence in Woodward County, Oklahoma?

A. Yes.

Q. How long did you know him there and what was the nature of your acquaintance with him?

A. I knowed him and knowed of him about four years working with cattle.

Q. State if you were ever employed by Mr. Edmisson?

A. No, sir.

Q. State what you were doing in the latter part of November and the early part of December, 1899, in connection with Mr. Edmisson, if anything.

A. Working with cattle, rounding up.

Q. State if you were at that time familiar with the brands that Mr. Edmisson placed on his cattle at that time?

A. Yes, sir.

Q. State if you were at that time familiar with the brands Mr. Edmisson placed on his cattle at that time?

A. I was.

Q. State with what marks Mr. Edmisson's cattle were branded.

A. They had *X-2* on left side, *X-2* on left hip, all on left side or left hip. The cattle that were branded on the left side did not have brand on left hip and those branded on the hip were not

153 branded on the side. There were some cattle branded 55 on the left side.

Q. State if you were at that time and place acquainted with one James Bryson?

A. I was.

Q. State whether or not you were employed by Mr. Bryson at that time.

A. I was.

Q. State if you know whom Mr. Bryson represented.

A. He said he was representing the Drumm-Flato Commission Company.

Q. State if the Drumm-Flato Commission Company is the defendant in this cause.

A. Yes, sir, I think so.

Q. State for what purpose you were employed by Mr. Bryson on behalf of this company, if at all.

A. I was employed by Mr. Bryson to help gather up the Edmisson cattle.

Q. State for whom these cattle were being gathered up.

A. Bryson said it was for the Drumm-Flato Commission Company.

Q. State whether or not you assisted Mr. Bryson in gathering up these cattle for that company.

A. Yes, sir, I did.

Q. State what other persons, if anybody, besides you and Mr. Bryson were engaged in the work of gathering up these cattle for this company.

A. There was Oscar Brothers, Millard Holman, Otis Guthrie, R. C. Edmisson, Jim Bryson and myself.

Q. State who employed these men, excepting Mr. Edmisson.

A. Jim Bryson.

Q. State fully what was done by Mr. Bryson and the men employed by him, together with Mr. Edmisson, in rounding up, cutting out and disposing of these cattle, if you know.

A. Well, we all met at Mr. Edmisson's one evening, stayed all night and next morning went about ten miles to the mouth
154 of Main Creek and rounded up and brought in about 800 head of *X-2* and 55 cattle and put them in Edmisson's little pasture that night.

Q. In whose pasture did you get these 800 cattle?

A. We got them from the Chapman pasture.

Q. Describe the Chapman pasture as to size and location.

A. It is about fifty five miles around the pasture. It is partly in Woods County and part in Woodward County, Oklahoma. I think the line runs about through the middle.

Q. Where is the Edmisson little pasture you put these 800 head of cattle into.

A. It is about twelve miles east of Curtis, Oklahoma.

Q. State its location as regards the Chapman pasture.

A. It is inside of the Chapman pasture, this big one I told you about.

Q. Do you know the location of the Harrington pasture?

A. Yes, sir. It joins the Edmisson little pasture.

Q. State whether or not there is a way of communication between the Harrington pasture and the small Edmisson pasture.

A. Yes, there is a gate.

Q. After you put these 800 head of cattle in Edmisson's little pasture, state whether or not Mr. Bryson and the rest of your men heretofore mentioned rounded up and put into this little pasture any other of Edmisson's cattle.

A. Yes, sir, we did.

Q. What was done with the 800 head of cattle already on the Edmisson little pasture while you were rounding up the other cattle?

A. We left them in that pasture, the Edmisson little pasture.

Q. State what other cattle belonging to Mr. Edmisson, if any, were put into this little pasture by you men with this eight hundred.

A. We put, altogether, something over seventeen hundred head of X-2 and 55 cattle into this little pasture.

155 Q. State what was done with any stray cattle, if any were gotten into this little pasture.

A. After we got done, we rounded up all the cattle that was in the little Edmisson pasture and cut out all the strays, leaving only the X-2 and 55 cattle in there.

Q. State if you know how many of Edmisson's cattle were left in that little pasture after cutting out the strays.

A. After we cut out the strays, we drove them about a mile to a gate and counted them as they went through this gate, seventeen hundred and ten.

Q. Who was present and assisted in rounding up these cattle?

A. Oscar Brothers, Otis Guthrie, Millard Holman, Mr. Edmisson, Jim Bryson and myself.

Q. State who actually counted these cattle at that gate.

A. R. C. Edmisson, Jim Bryson and myself.

Q. What were the other men named doing while you were counting?

A. They was back driving up the cattle to the gate.

Q. To what gate and what other cattle do you refer.

A. I mean the gate that goes in from Edmisson's little pasture into Harrington's pasture; the cattle is the other part of the band we were taking out, them that had been put into the little Edmisson pasture, except the strays.

Q. Where did you, Mr. Edmisson and Mr. Bryson stand while counting these cattle of Mr. Edmisson's from the Edmisson pasture to the Harrington pasture?

A. We stood on each side of the gate.

Q. What did you men do at the gate as these cattle were being driven up?

A. We counted them as they went through.

Q. State if you tallied the cattle as they came through?

A. Yes sir.

156 Q. State how many you gentlemen counted before you tallied.

A. One hundred.

Q. What did you do, if anything, when you counted a hundred?

A. Tied a knot in a rope.

Q. State if you, Mr. Bryson and Mr. Edmisson each tied a knot in a rope when one hundred cattle had been counted.

A. Yes sir, we each had a rope and each tied a knot in his own rope.

Q. State how many cattle of the brands you have mentioned were thus counted at that time by you three men.

A. Seventeen hundred and ten head.

Q. State if each of you had seventeen knots tied in your three several ropes?

A. Yes sir.

Q. State if you three men compared your several counts at that time.

A. Yes sir we did.

Q. State if you three men agreed in your count at that time.
A. We did.
Q. State the number of cattle then agreed upon by you gentlemen in this count, belonging to Mr. Edmisson.
A. We agreed on seventeen hundred and ten head.
Q. What was done with these cattle after you had agreed on the count?
A. We drove them over to West Creek and watered them and turned them loose.
Q. To whom were these cattle delivered by Mr. Edmisson, if you know?
A. They were delivered to Mr. Bryson.
Q. Whom do you mean by "we" when you say you drove these cattle over to West Creek?
A. I mean Jim Bryson, Oscar Brothers, Millard Holman, Otis Guthrie and myself.

157 Q. State if Mr. Edmisson accompanied you gentlemen with these cattle after you left that gate you spoke of, or after the cattle were turned over to Mr. Bryson.

A. Edmisson was not with us until next evening.
Q. What was the size of the Harrington pasture into which the cattle were turned after the count was made?
A. Eight or ten sections, I think. This is a rough guess.
Q. What time of day was it when this count was made?
A. It was late in the afternoon.
Q. How does West Creek run with reference to Main Creek?
A. It is the north prong of Main Creek.
Q. In what direction does West Creek run?
A. Northeast, southwest.
Q. What was done with these cattle after they were counted into the Harrington pasture?
A. When they were watered they were turned loose until next morning.
Q. What was done with them then?
A. We rounded them up and started to Curtis with them.
Q. Were there any other cattle in the Harrington pasture?
A. There might have been a few strays.
Q. Was—what was done with these strays?
A. Taken to Curtis.
Q. What was done with them when you got to Curtis?
A. We cut them out, then.
Q. What was done with these cattle after the strays were cut out?
A. They were put into the shipping pens and shipped to Kansas City.
Q. State to whom they were shipped, if you know.
A. To the Drumm-Flato Commission Company.
Q. Who shipped them?
A. Jim Bryson shipped them.
Q. State whether or not you noticed Mr. Edmisson and Mr. Bryson talking together at Curtis at that time.

158 A. I did.

Q. State if you know what was said by Mr. Edmisson and

Mr. Bryson at that time about the cattle business in connection with the Drumm-Flato Commission Company, and state who was present.

Here Mr. Young objected as follows:

By Mr. YOUNG: That is objected to as incompetent, irrelevant and immaterial.

By Mr. SWINDALL: That is relating to these other cattle.

By the COURT: Read the question again so I can see what it is.

By Mr. SWINDALL: State if you know what was said by Mr. Edmisson and Mr. Bryson at that time about the cattle business in connection with the Drumm-Flato Commission Company, and state who was present.

By the COURT: I think that would be competent if they were talking together.

By Mr. YOUNG: I think it was the other question.

By Mr. SWINDALL: No, that was the question. It reads this way, the other one, too; State whether or not you noticed Mr. Edmisson and Mr. Bryson talking together at Curtis at that time.

A. I did.

Q. State if you know what was said by Mr. Edmisson and Mr. Bryson at that time about the cattle business in connection with the Drumm-Flato Commission Company and state who was present.

By Mr. YOUNG: Well, we withdraw our objection. I didn't understand the question.

Mr. Swindall continues reading deposition as follows:

A. I don't think anybody was present but me, Bryson and Edmisson. Me and Bryson were talking when Edmisson came up. Edmisson wanted Bryson to hold over that day until he could go back to his little pasture and get enough cattle to fill out the contract between Edmisson and Drumm-Flato Commission
159 Company. Bryson told Edmisson he didn't want to wait, couldn't wait, that it was getting late and cold and the cattle were too poor and weak to work.

Q. State by whose orders, if by any person's orders, the rounding up of these cattle into Mr. Edmisson's pasture had been stopped before the full contract number had been secured.

A. Bryson's orders.

Q. State what portion of the Chapman pasture in which Mr. Edmisson had his cattle was actually worked by you men in gathering up Edmisson's cattle.

A. The northeastern part of the big pasture.

Q. How much was not worked in this gathering up of these cattle?

A. I think there was about one third of this pasture not worked. That is, the large pasture.

Q. State whether or not Mr. Edmisson told Mr. Bryson in the conversation at Curtis what cattle he had with which to fill out the order, if you know.

A. X-2 and 55.

Q. Where were these cattle with which he was to complete the contract?

A. Edmisson claimed they were in his little pasture at home.

Q. State whether or not Mr. Bryson permitted Mr. Edmisson to get these cattle to fill out the contract.

A. Bryson said he could not wait; that the cattle were too poor and it was getting late.

Q. Did Bryson let him go back to get the cattle?

A. No, he said he could not wait.

Q. State if you know the ages and sex of the cattle delivered to the defendant herein or to their agent, Mr. Bryson, by Edmisson.

A. I do. They was mixed cattle. I mean by mixed, cows, calves, yearlings, two-year olds, three year olds and four year old steers.

Q. Give the date of the round up and delivery of these
160 cattle and how long you men were engaged in it, as near as you can.

A. It was about the last of November or the early part of December, 1899. I don't remember just exactly the length of time I will say between eight and ten days.

Q. Where was the little Edmisson pasture with reference to Mr. Edmisson's house?

A. It run about a mile south of his house.

Q. What portion, if any, of the Chapman pasture did you fail to work?

A. The southwest part.

Q. State whether or not there is a dividing line in this pasture.

A. Yes, there is a cross fence.

Q. State whether or not this cross fence enclosed the part you did not work.

A. We made one round up on that side.

Q. State whether or not there was a division line between the part you worked and the part not worked.

A. We went through that fence and made one round up. There was no dividing line from that clean on south to the main fence. I mean from where we rounded up the cattle there was no fence to keep them from going south eight or ten miles.

Q. State whether or not any cattle were left belonging to Mr. Edmisson in any of these pastures.

A. The parts that we worked we gathered them as clean as we could. There were a few left that were too poor to drive handy.

Q. State if you know how many cattle were in the portions of the pasture you did not work.

A. I think there must have been about seven or eight hundred. That is guesssing.

By Mr. NOAH (interrupting): The defendant moves that the answer be stricken from the consideration of the jury as incompetent,
irrelevant and immaterial and not responsive to the question.
161 By the COURT: Objection overruled.

By Mr. NOAH: Exception. The objection is based upon the fact he says he doesn't know.

By the COURT: He says he thinks there was seven or eight hundred head.

Mr. Swindall continues the reading of the deposition, as follows:

Q. Did you work south of Main Creek and West Creek?

A. Oscar Brothers worked southeast part of Main Creek. We worked West Creek while Oscar Brothers was gone to southeast part of Main Creek.

Q. State if anybody worked that portion of the pasture in which you said there was some seven or eight hundred cattle left.

A. No one worked it at that time.

Q. When was it worked?

A. It had been worked just a few days before that time.

Q. State if these seven or eight hundred cattle remained in this pasture after the count of that seventeen hundred and ten.

A. They did.

Q. How do you know there was seven or eight hundred cattle in the southwest portion of the Chapman pasture belonging to Edmisson which you did not include in this round up?

A. Just a few days before this round up we rounded a pasture in the southwest part of the big Chapman pasture which was known as the Tom Govier pasture, that was owned by John Mosby at that time, to cut out and clean up everything that did not belong to John Mosby and there was between five and six hundred of the Edmisson cattle that we put back into the big pasture.

By the COURT: How much is there of it, Mr. Swindall?

By Mr. SWINDALL: About four or five more questions.

By the COURT: Very well, proceed then.

162 Mr. Swindall continues reading as follows:

Q. State if these cattle or any of them were included in the bunch turned over to Mr. Bryson.

A. I don't think they was.

Q. State if you know the contents of the contract for the delivery of these cattle to the company.

A. I do.

Q. How did you become acquainted with the terms of this contract?

A. Mr. Bryson told me that Edmisson was to turn over to the company nineteen hundred head of cattle just as they were gathered on the range.

Q. State whether or not you heard a conversation between Mr. Bryson and Mr. Edmisson the evening or the day before the delivery of these cattle.

A. Yes, I did.

Q. Please state that conversation.

A. Edmisson wanted Mr. Bryson to hold over one more day and round up the southwest part of the big pasture so that he could fill out the count, the nineteen hundred. Bryson told him that he couldn't wait; that he was getting such a herd and the cattle was so poor and weak that he couldn't afford to work and jamb what he had already gathered around any more.

Q. Were you ever in Mr. Edmisson's employ?

A. No sir.

Q. Any relation to Mr. Edmisson?

A. No. sir.

E. F. BLACK.

Subscribed and sworn to before me this 7th day of December, 1903.

[SEAL.]

L. L. SWAN,
Notary Public for Oregon.

163 STATE OF OREGON, *County of Linn, ss:*

I, L. L. Swan, Notary Public within and for the county of Linn and State of Oregon, do hereby certify that the above named E. F. Black, the witness whose name is subscribed to the foregoing deposition was by me first duly sworn to testify the truth the whole truth and nothing but the truth, in the case aforesaid, and that the deposition by him subscribed was reduced to writing and subscribed by said witness in my presence and the same was taken on the 7th day of December, A. D. 1903, between the hours of eight o'clock A. M. and six o'clock P. M. of said day, and at the office of Samuel M. Garland, in the town of Lebanon in the County of Linn, and State of Oregon, as specified in the notice hereto attached, and that I am not attorney for either of said parties or otherwise interested in the event of said action.

Witness my hand and notarial seal at Lebanon in said county this 7th day of December, A. D. 1903.

[SEAL.]

L. L. SWAN,
Notary Public for Oregon.

By the COURT: Gentlemen of the jury: It is now twelve o'clock and we will adjourn this case until after dinner. During the adjourned hour, you will remember the admonition the Court has heretofore given you. Do not talk to any person or allow any person to talk to you nor talk among yourselves, nor form nor express an opinion in the case until it is finally submitted to you. Adjourn court until half past one.

Here court adjourned until half past one o'clock, April 28, 1904, at which time the trial of the above cause was resumed.

Jury all present. Counsel for plaintiff and defendant present.

By the COURT: Proceed with this case.

By Mr. SWINDALL: There is a witness, Mr. Tolbert, I think is competent on direct for the reason——

164 By the COURT: Don't argue about it, gentlemen. Put him on if you wish to do so.

By Mr. SWINDALL: Mr. Tolbert.

A. W. TOLBERT.

A. W. TOLBERT, called as a witness on behalf of the plaintiff in the above entitled cause, being first duly sworn, testified as follows:

Direct examination by CHAS. SWINDALL:

Q. Where do you reside Mr. Tolbert?
A. Quinlan, Quinlan, Woodward County.
Q. How long have you resided in Woodward County?

A. About seven years.
Q. How long?
A. About seven years.
Q. Where were you residing in 1899?
A. Well, my family was in Woodward; I was working on the Maxwell-Morris ranch.
Q. Are you acquainted with R. C. Edmisson, the plaintiff in this case?
A. Yes sir, I know R. C. Edmisson.
Q. How long have you known him?
A. Well, sir, I got acquainted with Edmisson in 1901, I believe.
By the COURT: That is immaterial.
A. When I first got acquainted with him.
Q. What business were you engaged in on the Smith-Maxwell and Morris ranch?
A. I was working on the ranch, riding line.
Q. What lines mostly?
A. West and northwest line.
Q. Are you acquainted with the bunch of cattle Mr. Edmisson had in there at that time?
165 A. I was acquainted with the brands they said was Edmisson's.
Q. What brand was it?
A. X-2-Bar.
Q. Any 55's?
A. Yes, sir, there was some 55's in the bunch.
Q. State whether or not you ever saw any of the X-2-Bar's and 55 cattle in there after the first of December, 1899?
A. Yes, sir, I saw some of them, sir.
Q. About how many head?
A. Well, mighty hard to tell.
Q. Well, as near as you can approximate.
A. Oh——
By Mr. NOAH: That is objected to as incompetent.
By the COURT: Oh, if it amounts to knowledge you may state. If it doesn't amount to a knowledge, of course it is not competent.
A. From three to five hundred head, somewhere from three to five hundred head.
Q. That was in the north and west side of this pasture?
A. Yes, sir.
Q. State what relation if any you are to James R. Gober?
A. He is a brother in law of mine.
Q. State what if any conversation you ever had with Mr. Gober relative to what he would make out of gathering these cattle for Drumm-Flato.

By Mr. NOAH: Objected to as incompetent, irrelevant and immaterial.
By the COURT: Oh, I think it is immaterial what he said he would make out of the cattle.
By Mr. SWINDALL: I think not. I think we can prove what he said he would get out of gathering these cattle.

By the COURT: What difference would it make if he made everything or nothing?

By Mr. SWINDALL: But, your Honor, if he was to get three
166 or four dollars a head for gathering them——

By the COURT: If he got three or four dollars a head or ten dollars a head, they might have given him a hundred to make him exert himself a little more.

By Mr. SWINDALL: Yes, but I am talking about what he made out of them. If he got so much money and was to get so much a head, the natural consequence was he was getting so many cattle.

By the COURT: If he said anything to this witness as to how many head he got, why he can state that.

By Mr. SWINDALL: I don't know that he said anything about the number of head, but what he was getting per head; that is all, I guess.

By the COURT: He can state anything that would reach that conclusion. I do not mean to rule that he must state it in so many words, but if he made any statements that gave any knowledge to this witness, he may state that.

Q. Did he make any statements to you relative to how many head he would get?

A. No, sir, he did not.

Q. Did he give you an idea of how many head he had gathered?

A. No, sir, he did not.

By Mr. SWINDALL: That is all.

Cross-examination by O. G. YOUNG:

Q. Mr. Tolbert, what date was it you saw these cattle in this pasture, you remember?

A. Why, it was in 1900, I believe.

Q. I know, but what month, what day of the month?

A. Well, I couldn't say as to that. It has been so long.

Q. You couldn't state whether it was in the fall, along about November?

A. No, I believe it was in the spring.

Q. In the spring?

167 A. Yes, of 1900.

Q. In the spring of 1900?

A. Yes, along in the spring.

Q. Now, where do you say these cattle were?

A. In the north and west part of the Maxwell-Morris pasture.

Q. In the spring of 1900?

A. Yes, sir.

By Mr. YOUNG: That is all.

Redirect examination by CHAS. SWINDALL:

Q. Did you notice any dead cattle there during that winter of the Edmisson brands?

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial.

Q. In the Gober pasture?
By Mr. NOAH: Same objection.
By the COURT: The objection is overruled, if they confine it to the Gober pasture.
By Mr. NOAH: Exception.
Q. Answer the question.
By the COURT: Answer the question.
A. Why, I don't know. I couldn't swear there was. I couldn't swear that there was or wasn't.
By Mr. SWINDALL: That is all.
By the COURT: What is your first name?
A. A. W.
By the COURT: Proceed, gentlemen.

Witness excused from the stand.

By Mr. SWINDALL: We would like to offer in evidence the testimony of Mr. George Stickles, taken in the former trial.

By Mr. NOAH: To which we object as incompetent, irrevelant and immaterial, no proper predicate having been laid for it and because it is also secondary and hearsay.
168 By Mr. SWINDALL: We can lay the predicate, so far as the predicate is concerned.
By the COURT: The objection will be sustained at present.

By Mr. SWINDALL: Mr. Edmisson, R. C. Edmisson.

R. C. EDMISSON.

R. C. EDMISSON, recalled as a witness in his own behalf, testified as follows:

Direct examination by CHAS. SWINDALL:

Q. Mr. Edmisson, are you acquainted with George Stickles, a witness who testified in the former trial of this case?
A. Yes, sir.
Q. How long have you been acquainted with him?
A. Five years, I reckon.
Q. Do you know where he is now?
A. No, sir, I don't know where he is.
Q. Have you made search and inquiry to ascertain his whereabouts?
A. Yes, sir, I have been to his place. I was told by his neighbors he had gone off with a show, in charge of a show or something or other.
Q. Do you know what his address is so you could take his deposition?
A. No, sir, I don't. He is traveling, I understand.
Q. Do you know where he is so you could have a subpœna issued for him?
A. No, sir.
Q. When did you make this inquiry relative to where he was?

A. Well, I have been there about ten days ago, I was there, and then I was there, well, last week, one day, and still he hadn't come back.

Q. Has he always resided in that county, Woodward County, prior to now?

A. He lives in Woods County, just across the line.

Q. He had been residing there prior to that time?

A. Yes, sir.

169 Q. You don't know where he is at the present time?

A. No, sir, I don't know where he is.

Q. And could you procure his personal attendance here?

A. No, sir, I couldn't.

Q. Did you ever anticipate he was going to leave the country?

A. Never knew anything about it until I went to hunt for him, and he was gone.

By Mr. SWINDALL: That is all for the present.

Cross-examination by O. G. YOUNG:

Q. Know whether he is in the Territory or not?

A. I don't know, sir.

By Mr. NOAH: That is all.

By Mr. SWINDALL: We now offer the former testimony in this case.

By Mr. NOAH: We object for the same reasons and that they have not laid any predicate. It is incompetent for that reason. And we wish to show the Court some authorities on that point, if the Court wants to hear them.

By the COURT: The Court cannot pass upon the question of whether it is competent or not until I hear it, hear the questions read.

By Mr. NOAH: The question arises upon the competency of any of the testimony of this witness until first the predicate is laid, and second——

By the COURT: That does not go to the question of the competency of the testimony. Gentlemen, there certainly has not been any foundation laid for this testimony. It will not do to say a man can go to the home of a witness ten days before the trial and because he does not find him at home, that that will be foundation for introducing his former testimony. That would not be sufficient for continuance.

By Mr. SWINDALL: He says he made inquiry.

By the COURT: This case was decided by the Supreme Court and reversed last——

170 By Mr. NOAH: September.

By the COURT: Last September.

By Mr. SWINDALL: He didn't know when it would be tried ten days before; ten days before is as soon as he would have any witnesses subpœnaed.

By Mr. SNODDY: The evidence shows this man has always resided in that neighborhood and none of his neighbors knew anything about him.

By the COURT: There is very little showing about that.

By Mr. SWINDALL: We then offer the deposition of Millard Holman, taken at Amarillo, Texas.

By the COURT: What is the name?

By Mr. SWINDALL: M. N. Holman. This deposition was taken on the 17th day of September, 1903.

By the COURT: I wish to state that I have a letter from the Clerk of the Supreme Court charging that record to this court, or to the judge of this court. It will not be taken away from the court room.

By Mr. SWINDALL: Yes, sir, we didn't want to. Are you through, your Honor?

By the COURT: Go ahead. I was going to make a remark, but I will not do it.

By Mr. SWINDALL: I thought you were going to make an order to fine any of us who took it out, and I was going to object to that.

By Mr. SNODDY: Glad the responsibility is on the Court.

Here Charles Swindall reads the direct examination of the witness Millard Holman, as follows:

Notice to Take Deposition.

TERRITORY OF OKLAHOMA, *County of Woods, ss:*

In the District Court of Woods County, Oklahoma Territory, Sitting in and for said County of Woods.

171 R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, Defendant.

The said Drumm-Flato Commission Company and Botsford, Deatherage and Young and H. A. Noath, attorneys of record for defendant in the above entitled action, will take notice that on Thursday, December 17th, 1903, the plaintiff above named will take depositions of sundry witnesses, to be used as evidence in the trial of the above cause on behalf of the plaintiff, wherein said R. C. Edmisson is plaintiff and Drumm-Flato Commission Company are defendants, at the office of Reeder and Cooper, in the town of Amarillo, County of Potter, and State of Texas, between the hours of eight o'clock A. M. and six o'clock P. M. of said day, and that the taking of the same will be adjourned and continued from day to day at the place named, and between the said hours until they are completed.

TEMPLE HOUSTON,
D. P. MARUM,
SNODDY & SON, AND
CHARLES SWINDALL,
Attorneys for Plaintiff.

Service of the above notice is hereby acknowledged to have been made on us this 11th day of Dec., 1903.

BOTSFORD, DEATHERAGE & YOUNG, AND
H. A. NOAH, *Attorneys for Defendant.*

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, Defendant.

Depositions of witness taken to be used in an action pending in the District Court within and for the County of Woods, in the Territory of Oklahoma, wherein R. C. Edmisson is plaintiff
172 and Drumm-Flato Commission Company is defendant, in pursuance of the notice hereto attached, and at the time and place therein stated, except as to date, said depositions having been taken on the 21st day of December, 1903, not being able to take said depositions on the 17th day of December, 1903, by reason that the witness, M. M. Holman, was sick and not able to depose, on account of which the taking of same was adjourned from eleven o'clock A. M. of December 17th, 1903, to ten o'clock A. M. of December 21st, 1903, at which time the deposition was taken. The said R. C. Edmisson, plaintiff, appeared by attorney and the said Drumm-Flato Commission Company appeared by attorney.

And thereupon the said R. C. Edmisson produced the following witness, to wit: M. M. HOLMAN, of lawful age, who, being first duly sworn, deposeth and saith in reply to interrogations propounded, to wit:

Direct examination by REEDER and COOPET, attorneys for R. C. Edmisson.

M. M. HOLMAN, Witness, sworn.

Q. State where you now reside.
A. Amarillo, Texas.
Q. Where did you reside in November and December, 1899?
A. In Woodward County, Oklahoma.
Q. Were you acquainted with R. C. Edmisson?
A. Yes.
Q. State whether or not you were acquainted with Mr. Bryson at that time.
A. Not until I went to work for him.
Q. When did you begin to work for Mr. Bryson?
A. In December, 1899.
Q. State what you were employed by him to do?
A. To gather cattle.
Q. State if you know what brands of cattle he was gathering?
A. X-2- and 55.
173 Q. State where these cattle were ranging at the time you gathered them?
A. On Jim Gober's ranch, in Woodward County, Oklahoma.

Q. State whether or not Mr. Bryson stated to you who he represented?

A. Drumm-Flato Commission Company.

Q. State if you know who owned the cattle in those two brands that you gathered?

A. Mr. Edmisson's.

Q. State, if you know, for what purpose these cattle were being gathered.

A. I do not know.

Q. State if you know how many of these cattle were gathered by you and other employees of Mr. Bryson?

A. Seventeen hundred and ten head.

Q. State the kinds of cattle as near as you can, the grade.

A. General mixture, cows, calves and steers.

Q. State whether or not you or anyone counted these cattle after they were gathered?

A. Yes.

Q. State when and where you counted them.

A. Don't know the day of the month, about one mile west of Edmisson's ranch.

Q. State how you counted them.

A. Going through a gate.

Q. State whether or not any other party counted the cattle at the same time and under the same conditions that you counted them.

A. I don't know.

Q. State if you know who had charge of these cattle at the time you counted them?

A. I could not say as to that.

174 Q. State who was present and who had charge of the drove at the time you counted them.

A. Mr. Bryson.

Q. State if you know who was giving directions as to what should be done with the cattle at the time you counted them?

A. Mr. Bryson.

Q. State if you know where Mr. Edmisson was at the time you counted them?

A. Yes.

Q. Where was he?

A. He was helping drive the cattle through the gate.

Q. What became of these cattle after they carried them through the gate?

A. We rounded them up in Robert's pasture.

Q. Under whose direction did you round them up?

A. Mr. Bryson's.

Q. What was the purpose in rouding them up, if you know?

A. To hold them over night.

Q. When was this?

A. About dark in the month of December.

Q. State whether or not the cattle were held over night in the Roberts pasture?

A. Part of the night.

Q. What did you then do with them?
A. Turned them loose.
Q. How long did they remain loose in that pasture?
A. Till the next morning.
Q. What did you then do with them?
A. Rounded them up again.
Q. Then what did you do with them?
A. They began to cut out some cattle and I left.
175 Q. Under whose direction were these cattle cut out?
A. Mr. Bryson, I suppose. I could not say for sure.
Q. Did you aid in cutting them out?
A. No.
Q. State whether or not you know how many were cut out?
A. I do not.
Q. Do you know what became of them, of these cattle after they began to cut cattle out of the herd?
A. No.
Q. After you counted the cattle at the gate and till they began to cut the cattle out, at which time you left, for whom were you orking during that time?
A. Mr. Bryson.
Q. State if you know who were giving orders and directions as to the management of the herd of cattle during that time?
A. Mr. Bryson.
Q. State whether or not you had anything more to do with this herd of cattle after you quit?
A. Yes.
Q. When?
A. Next night.
Q. State whether or not these cattle that you counted at the gate were ever removed from the Roberts pasture?
A. Yes.
Q. State if you know who had them removed from that pasture?
A. Mr. Bryson.
Q. State whether or not you assisted Mr. Bryson in moving the cattle from that pasture?
A. Yes.
Q. Where did you take them to?
176 A. Started to Curtis with them.
Q. Did you taken them to Curtis?
A. Yes. We got to Curtis about sun down, the same day, then turned them loose in a small pasture near Curtis.
Q. What time of the day was it when you turned them loose?
A. Between sundown and dark.
Q. State if you know how many cattle were driven, by Mr. Bryson, from Robert's pasture to Curtis?
A. I do not know.
Q. State if you know how many cattle were cut out of this herd in Robert's pasture?
A. I do not know.
Q. Do you know what brand was cut out in Robert's pasture?
A. No.

Q. State if you know how many cattle were placed in the small pasture by Bryson at Curtis?
A. I do not know.
Q. State if you know what became of those cattle after they were placed in the small pasture at Curtis?
A. We rounded them up the next morning after we turned them loose the night before.
Q. State what became of them then?
A. We cut out about ten or fifteen head that got in that night, then grazed them until about three o'clock in the evening.
Q. State what was then done with them.
A. I could not say. I quit there.
Q. State whether or not Mr. Edmisson assisted any in rounding up and handling these cattle as you have before stated?
A. Yes.

177 Cross-interrogatory- by J. N. BROWNING, representing defendant:

Q. Where were you living, Mr. Holman, at the time Mr. Bryson hired you?
A. About sixteen miles from where the cattle were gathered.
Q. What direction were you living from them?
A. Southwest of the pasture the cattle were gathered in.
Q. Had you worked any for Mr. Edmisson before that time?
A. No.
Q. Were you acquainted with him before that time?
A. Yes.
Q. How long had you known him?
A. Possibly three years.
Q. Was he any relation of yours?
A. No.
Q. Where were you at the time Mr. Bryson employed you?
A. At the head of Main Creek, Woodward County, at a round up.
Q. He had five or six other men employed, did he?
A. Yes.
Q. What were you doing, helping to work the cattle, or with a wagon?
A. With the cattle.
Q. How many days were you in gathering these cattle?
A. Nine days.
Q. Under whose directions were you working?
A. Mr. Bryson's.
Q. Did Mr. Edmisson give any orders at any time during the time you were gathering them?
A. Yes.
Q. They were both working together, Bryson and Edmisson?
A. Yes.
Q. Did Mr. Edmisson have any men of his own along with the round up?
A. One man.

178 Q. Who was he?
A. Otis Guthrie.

Q. What time of the day was it when you counted these cattle passing through the gate?
A. I began about sun down and got through about dark.
Q. Who told you to count them?
A. No one.
Q. How come you to count them?
A. For curiosity more than anything else.
Q. Were you sure they were all cattle in Mr. Edmisson's brand?
A. No.
Q. You just counted the bunch as they passed through the gate to satisfy your own curiosity?
A. Yes.
Q. Did you count the calves?
A. I counted everything.
Q. There were calves in the bunch, were there?
A. Yes.
Q. About how many?
A. I don't know, general mixture, I could not say exactly.
Q. Well, could you say that there were one hundred calves?
A. I could not.
Q. About then, what would you estimate the matter?
A. I would not estimate at all, I don't know.
Q. Isn't from sun down till dark a very short time for seventeen hundred head of cattle to pass through a gate?
A. I don't know that it is.
Q. Had you ever had any experience in handling before then?
A. I have been raised on a ranch and had ten or twelve years' experience in handling cattle.
Q. How wide was this gate that the cattle were passing through?
179 A. A common gate, about twelve or fourteen feet. I don't remember just exactly.
Q. It was wide enough for a wagon to go through all right, was it?
A. Yes.
Q. Now, was there any one on the other side of the gate near it?
A. Yes, Dock Black and Jim Bryson.
Q. What were they doing over there?
A. I could not say.
Q. Now did you so place yourself as to require these cattle to pass through one at a time?
A. No.
Q. They would pass sometimes six or eight in abreast, would they?
A. Four or five.
Q. Well, could you make a correct count in passing through that way?
A. Yes.
Q. Now, Mr. Holman, were you with the cattle when they left Jim Gober's camp about a mile or a mile and a half east of that gate?
A. Mr. Gober had no camp that I knew of.
Q. Well, you drove the cattle from east of the gate to it, did you?
A. Yes.

Q. How far ?
A. Possibly two miles.
Q. Did you leave Mr. Gober there?
A. I did not see him.
Q. Was he with the outfit then?
A. No.
Q. Was he with it any time?
A. I did not see him but one time.
Q. Now, why did you take the cattle from two miles east of the gate to the gate to turn them into that pasture?
180 A. To hold them in that pasture over that night.
Q. Is it not a fact that you started about sun down?
A. No.
Q. About what time was it?
A. Early in the evening.
Q. Well, how early?
A. Some time after three o'clock, I had been with the cattle all the evening myself, between three and four.
Q. When you started two miles east of the gate to the gate, you had a creek to cross some five or six times, did you?
A. No.
Q. Well, did you cross a creek at all on the way?
A. Yes, one.
Q. Only one?
A. Yes.
Q. Well, isn't it a fact that it was after dark when you got to that gate?
A. No.
Q. What makes you think it was not?
A. I have nothing.
Q. Did not Mr. Edmisson tell you to go to the gate and count them as they went through?
A. No.
Q. Well, did you hear Mr. Edmisson and Mr. Bryson talking at any time prior to this time you passed through the gate, about counting the cattle?
A. No.
Q. How many sections of land were in this pasture that you turned into that night?
A. Eight sections.
Q. Did anyone pass through the gate ahead of the cattle
181 in order to hold them after they passed through?
A. No.
Q. How long were you after you got through the gate rounding them up?
A. One half hour.
Q. Was it dark then?
A. Yes.
Q. You say in answer to Mr. Reeder's question that you held them while they turned them loose for the night?
A. Yes.
Q. At what time were they turned loose?

A. I could not say positively. I know the boys come in to go to bed a good while after they left them out there.
Q. Did Mr. Edmisson stay there with you all that night?
A. Yes.
Q. Did you go back to the ranch?
A. Yes.
Q. You said you rounded them up the next morning. At what time?
A. About nine o'clock.
Q. You say they were cutting out some when you left there?
A. Yes.
Q. Where did you go?
A. To Curtis.
Q. Was Mr. Edmisson there when they were cutting them out?
A. Yes.
Q. Did he assist in it?
A. I could not say.
Q. About how many head had they cut out up to the time you left?
A. About ten or twelve head and he sent me to Curtis.
Q. How far was it from there to Curtis?
A. Twelve miles.
Q. When did you next see the cattle?
182 A. Along that evening some time.
Q. Where were they then?
A. Still in the Roberts pasture.
Q. What was being done with them?
A. They were driving them when I met them that night, along the trail toward Curtis.
Q. Well, what did they do with them that night?
A. Turned them loose in Robert's pasture.
Q. When did they round them up again?
A. Next morning.
Q. Was Mr. Edmisson with them when they rounded them up?
A. Yes.
Q. What did he do with them?
A. Started to Curtis.
Q. At what time did you arrive at Curtis?
A. Between sundown and dark.
Q. The pasture you put them in near Curtis that night was one half section was it not?
A. Yes.
Q. How long did they stay in that pasture?
A. Over night.
Q. They took them out the next morning?
A. Yes.
Q. Where was Mr. Edmisson?
A. He had not gotten there yet.
Q. Did he before they shipped?
A. Yes.
Q. Did they ship that day?

A. I could not say.
Q. What did you do?
A. I stayed with them till three o'clock in the evening and quit them.
183 A. You mean that you quit the job and went home?
A. Yes.
Q. Well, was Mr. Edmisson and Mr. Bryson there when you left?
A. Yes.
Q. What were they doing with the cattle?
A. Just holding them grazing them, rather.
Q. Mr. Holman, you testified about this matter before this same notary public about the first of October, did you not?
A. Some time I do not know just the time, about a month or two ago.
Q. Well, did you not testify then that the time you counted these cattle through the gate was in December, 1901?
A. I could not say to that, I do not know.
Q. Has any one talked to you since about the matter to refresh your memory?
A. No, I have just been thinking about it myself from the time I left Oklahoma.
Q. When did you leave Oklahoma?
A. February, 1902.
Q. Did you testify in this case when it was tried at Alva before?
A. Yes.
Q. Who did you first tell about counting these cattle when they passed through the gate?
A. I don't remember, I told all as well as one when we were riding back to the ranch.
Q. Was Mr. Edmisson present?
A. Yes.
Q. Was Mr. Bryson present?
A. Yes.
Q. Then that was on the same evening that you did the counting then when you were on the way back to the camp?
184 A. Yes.
Q. Did you tell them how many head you had counted?
A. Yes.
Q. What did they say, if anything?
A. Nothing particularly.
Q. What, if anything, impressed it on your mind as to how many cattle were counted there that evening?
A. There was nothing that I remember of.
Q. You just simply remember that you counted them and that there were seventeen hundred and ten head?
A. Yes.
Q. No one requested you to count the cattle?
A. No.
Q. Did you make any memorandum of it at the time?
A. No.
Q. Never have yet?
A. No.

Q. What class of cattle were these, steers or she cattle principally?
A. Steers and cows and calves.
Q. Did you help load the cattle on the cars?
A. No.
Q. They had not begun to load any when you left?
A. No.
Q. You know what day of the month you quit work for Mr. Bryson and left them with the cattle?
A. No.
Q. You don't know whether they shipped the same day or not?
A. No.

185 Redirect examination by REEDER & COOPER:

Q. State whether or not there were other cattle in the Robert's pasture at the time you turned these in through the gate?
A. I don't know.
Q. State if you know from your own knowledge the condition of the fence around the Robert's pasture at the time you turned these cattle in?
A. I do not know.
Q. State whether or not when you rounded these cattle up in the Robert's pasture to drive them to Curtis, in your best judgment you had the same bunch that you had turned in the evening before?
A. Yes.
Q. State what brand Mr. Bryson was cutting out there in the Robert's pasture.
A. I don't know.
Q. State whether or not in your best judgment there were seventeen hundred and ten of these cattle driven from the Robert's pasture to the one half section pasture at Curtis?

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial.
By Mr. SWINDALL: There is an objection here. Objected to by defendant's counsel because it calls for a conclusion of the witness and is not the best evidence.
By the COURT: Objection overruled.
By Mr. NOAH: Exception.

Charles Swindall continues reading as follows:

A. I rather not pass my judgment on it.
Q. State whether or not of your own knowledge any of these cattle were cut out that you counted through the gate into the Robert's pasture, were cut out of this herd before they were delivered to the railroad company for shipment, at Curtis?
186 A. Not to my knowledge.
Q. State whether or not, Mr. Holman, that if a large number of these cattle had been cut out of the herd after you turned them into the Robert's pasture up to the time you quit work at Curtis, you would have known it?

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial.

By Mr. SWINDALL: Objected to by defendant's counsel because the question is leading and would call for the conclusion of the witness.

By the COURT: Yes, it is incompetent at this time. It is rebuttal if at all competent.

Q. State whether or not, within your knowledge, any of these cattle were cut out from the herd after you counted them up to the time you quit work for Mr. Bryson?

A. Not with the exception with the eight or ten head I saw cut out in Robert's pasture before I went to Curtis?

Here Mr. Young reads the Re-cross examination as follows:

Recross-examination by defendant's counsel, J. N. BROWNING:

Q. Did you make any effort to count these cattle after you had counted them the time you speak of?

A. No.

Q. What was your age at that time Mr. Holman?

A. Twenty-one.

Q. Then you would be about twenty-six now?

A. Hardly.

Q. What is your age now?

A. Twenty-four past.

M. M. HOLMAN.

187 STATE OF TEXAS, *County of Potter, ss:*

I, M. W. Cunningham, notary public, within and for the County of Potter, State of Texas, do hereby certify that the above named M. M. Holman, the witness whose name is subscribed to the foregoing depositions, was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in the case aforesaid, and that the depositions by him subscribed, was reduced to writing by me, and that the said depositions were reduced carefully read by the deponent, and subscribed by the witness in my presence; and the same were taken on the 21st day of December A. D. 1903, between the hours of ten o'clock A. M. and six o'clock P. M. of said day, and at the office of Reeder and Cooper, in the town of Amarillo, in the County of Potter, and State of Texas, as specified in the notice hereto attached, except as to date.

And I hereby certify that on December 17th, 1903, both parties to this suit, by their attorneys, appeared before me together with the witness M. M. Holman, between the hours of ten o'clock A. M. and six o'clock P. M. at the office of Reeder and Cooper in the town of Amarillo, Texas, but that on account of the witness M. M. Holman, being sick and not able to testify in this case, the taking of his deposition was adjourned over until Monday the 21st day of December, 1903, at which time said depositions was taken as above certi-

fied. I further certify that I am not attorney for either of the parties of this suit or kin to any of the parties or otherwise interested in the said action.

Witness my hand and seal of office this the 21st day of Dec., 1903.

M. W. CUNNINGHAM,
Notary Public, Potter Co., Texas.

188 By Mr. SWINDALL: Mr. Edmisson take the stand.

R. C. EDMISSON.

R. C. EDMISSON, called as a witness in his own behalf, testifies as follows:

Direct Examination by CHAS. SWINDALL:

Q. Mr. Edmisson, who if any one was present at your place after these seventeen hundred and ten head of cattle that you spoke of was delivered to Mr. Bryson and at the time you had this three hundred or three hundred and fifty head there in that small pasture?
A. Mr. Fuller was there.
Q. The gentleman that testified here this morning?
A. Yes sir.
Q. And that was after the seventeen hundred and ten head of cattle were delivered to Mr. Bryson?
A. Yes sir.
Q. Seventeen hundred and ten head were delivered to Mr. Bryson?
A. Seventeen hundred and ten head.
Q. State whether or not the defendant, the Drumm-Flato Commission Company, ever made any rendition to you of the number of cattle that they received after this contract was made with you?

By Mr. YOUNG: Object.
By the COURT: What is the ground of objection?
By Mr. YOUNG: Why should they make a rendition of it?
By the COURT: Why should they not?
By Mr. YOUNG: He knew that all of the cattle had been delivered.
By the COURT: He claims not. Of course the court cannot decide that proposition.
By Mr. YOUNG: I haven't any specific objection.

By the COURT: What is the question?
189 Last preceding question read by the stenographer.
A. No sir.
By the COURT: What do you mean by "rendition"?
By Mr. SWINDALL: Ever made any report of the number of cattle that they had received.
By the COURT: You mean, rendered any report?
By Mr. SWINDALL: How is that, your Honor?
By the COURT: You mean, rendered any report?
By Mr. SWINDALL: Yes sir, rendered any report of the cattle.
By the COURT: Of the count?

By Mr. SWINDALL: Of the number of cattle received by them, or the number of cattle received by Gober.

A. No sir, I never got any bill or no statement since that day.

Q. Had they been rendering you statements of the shipments made prior to that date?

A. Yes sir.

Q. State how many cattle you had in this pasture after you turned over this seventeen hundred and ten head to Drumm-Flato Commission Company.

By Mr. NOAH: I think he went over all that this forenoon.

By Mr. SWINDALL: I don't think I did with him. I think I did with another witness.

By the COURT: An objection was sustained to part of it.

By Mr. SWINDALL: I don't remember that part of it, your Honor.

By the COURT: Why, yes, you do.

By ERSKINE SNODDY: He said he had five hundred and seventy five head——

By the COURT: And objection was made to it. You placed in these facts if it was not the identical question.

190 Q. I believe you stated the number you saw in Gober's possession after that?

A. Yes sir.

By Mr. SWINDALL: That is all. I thought he had, but I wasn't sure.

Cross-examination by O. G. YOUNG:

Q. Mr. Edmisson, I will ask you if there wasn't about a hundred head of these cattle shipped off your range to other parties than the Drumm-Flato Commission Company in the Fall of 1899?

By Mr. SWINDALL: Objected to as not proper cross examination.

By Mr. MARUM: And as incompetent, irrelevant and immaterial, they are laying the time before the contract, and it is a different proposition.

By the COURT: Yes, he may have shipped thousands of cattle prior to that contract.

By Mr. YOUNG: Well, this was prior.

By the COURT: Objection is sustained.

By Mr. SWINDALL: Which one does your Honor sustain?

By the COURT: I sustain the one that is good.

By Mr. SWINDALL: We are a little jealous about this.

By the COURT: I am not obliged to pick out any objection. I will take my choice. If counsel wants to know which one is right, the Court might at another time tell you, but I would not do so now.

By Mr. SWINDALL: We rest, your Honor.

By the COURT: Plaintiff rests.

By Mr. YOUNG: Well, call Mr. Gober.

191 *Testimony on Behalf of Defendant.*

J. R. GOBER.

J. R. GOBER, called as a witness on behalf of the defendant in the above entitled cause, being first duly sworn, testified as follows:

Direct Examination by O. G. YOUNG:

Q. Mr. Gober, where do you reside at the present time?
A. Amarillo, Texas.
Q. Where did you reside in the winter of 1899?
A. My home was at Woodward, Oklahoma.
Q. What business were you engaged in at that time?
A. In the cattle business.
Q. Where were you—where was your cattle business?
A. They were located in Woods County, Oklahoma, this county, in the southwest part of the county, I believe.
Q. About how many cattle did you have under your charge during that Fall?

By Mr. MARUM: Objected to, your Honor. Would like to have the time made definite,—"in the fall"

By the COURT: I think it is immaterial how many he had under his charge except what is in litigation here, so far as anything I see.

By Mr. YOUNG: It is just simply asking him whether he has handled cattle or not.

By the COURT: Well, he stated that.

By Mr. YOUNG: This is a preliminary question.

By the COURT: I do not care to try another case or any other issues except those that are here. Proceed, gentlemen.

By Mr. YOUNG: Did you say for him to answer the question?

By the COURT: No sir. Objection sustained.

By Mr. YOUNG: Note an exception.

Q. Where was your pasture located with reference to Mr. Edmisson's pasture?

192 A. It was east of Mr. Edmisson's pasture; just a cross fence between us.

Q. You know Mr. Edmisson, R. C. Edmisson, the plaintiff in this suit, do you?
A. Yes sir.
Q. I will ask you if you had any business relations with the defendant during the Fall of 1900 or 1899, and the year of 1900?
A. Yes sir.
Q. What was that business relation, Mr. ——?

By Mr. SNODDY: We object to it unless it is confined to these cattle.

By Mr. YOUNG: Well, that is the business relation I desire to get at. I will ask the question he can answer yes or no, if you desire.

By the COURT: Have you any business relations in reference to the cattle in controversy here? If so, you may state.

A. Yes sir.
Q. What was you employed to do, Mr. Gober?
A. To gather the remainder of the Edmisson cattle.
Q. About what time, if you remember, did you begin to gather the remainder of the Edmisson cattle?
A. It was in December, latter part of December.
Q. How many of those cattle did you gather at the time you were engaged for that purpose?
A. I gathered and tally branded three hundred and thirty six head. I tally branded them in the early spring, and then ten head branded by mistake belonged to other parties, making three hundred and twenty six head of the Edmisson cattle.
Q. Where did you find these cattle, Mr. Gober, when you began to hunt for them?
A. I found some of them in Dewey County.
193 Q. How many?
A. There was nineteen head I believe.
Q. At whose premises, do you remember?
A. Mr. Albright's, near Seiling.
Q. Did you find any others out of the county or off of the range?
A. I found I believe it was twenty head at Mr. Frank Brown's abouut thirty five miles southeast of here.
Q. Who, do you know who had placed those cattle over there?
A. Not only by what parties that had them in their possession told me.

By Mr. SWINDALL: We object to that as incompetent and hearsay.

Q. Did you find any cattle on the range about Mr. Edmisson's premises?
A. I got sixteen head out of Mr. Edmisson's pasture.
Q. Where did you find the rest of the cattle, of this three hundred and twenty-six head you are speaking about?
A. I found about sixteen head, I believe it was, at a man's by the name of Fullers east of here about twenty-five miles; I don't just know the distance; and I found sixteen head at a man's by the name of Enfields, about thirty five miles from here, I don't know whether it is in this county or Grant County.
Q. How many of those you found at Enfield's turned out to be cattle that belonged to Edmisson?
A. I believe he replevied——

By Mr. SWINDALL: We object to that.
By the COURT: How many cattle did you get at Enfield's that belonged to Edmisson?

Q. That belonged to this brand?
A. Well, we contend that they all belonged to this brand.
By the COURT: How many did you finally get?
A. We got eleven head.
194 Q. Then where did you find the rest or any more of them?
A. We got about twenty or twenty-five head at the Mr. Quinlan's ranch I guess.

Q. Find any more of them, any more bunches?

A. Yes sir, picked up a few scattered ones in Mr. Maxwell and Morris' range.

Q. Did you work the country pretty thoroughly for these cattle?

A. Yes sir.

Q. What would you do with these cattle after you would get hold of them, Mr. Gober?

A. I turned them in my pasture and about the seventh of December, I put all the cattle I had gathered up to that time on feed.

Q. The seventh of what time?

A. Seventh of January.

Q. Did you put them on feed in your pasture or around on different places?

A. No sir, I put them on feed on the Cimarron River with the farmers that I could get to take them.

Q. What became of these cattle that you received?

A. There was two hundred and ten head of those cattle that I bought the following August, the latter part of July or August, from the Company, and the balance of the cattle was shipped to Kansas City.

Q. That would be how many head you shipped?

A. That would be the difference between two hundred and ten and three hundred and twenty-six. I believe out of the three hundred and twenty-six about seventeen of them had died.

Q. During the winter?

A. Yes sir, during the winter.

Q. Those were all the cattle you received while you were engaged in the employ of the defendant?

195 A. Yes sir.

Q. And all the cattle you received you accounted for to the defendant?

A. Yes sir.

Q. Mr. Edmisson, the plaintiff, spoke something about being at a round up where he asked to count the cattle that you received. Did you hear that statement of his?

A. I heard him testify this morning, yes sir.

Q. Well, just tell what occurred at that round up, and where it was.

A. The round up was in my pasture, and I rounded up, I suppose there was seven hundred head of cattle there, cattle that belonged to myself, and Mr. Smith and Chadbourne and some of Mr. Morris' cattle, and made a clean round up to cut the Edmisson cattle out to get them on feed. They were very poor. And Mr. Edmisson come up about the time the round up was going on and said to me that he was going to cut the figure five cattle and take them home, that they belonged to his nephew, John F. Arnold, and that the company had no right to them, and I said "Mr. Edmisson, if you think you can establish a title to these cattle, you have your recourse in law. You can't take anything away from me. Just let these cattle alone. If you want them, go and replevy them." He says "Well, I don't want to get killed." And I says "Well, I don't think there is any danger

of that," or something of the kind, and he asked me then if he could get some cattle he was pasturing, the Klonitz cattle, and he went and cut out I don't know how many, a small bunch, and when I got the Edmisson cattle all cut out of the bunch, I rode back to Mr. Edmisson and asked him to help me count the cattle; told him I was going to put them on feed and wanted to see how many there was. And he rode out and helped me count them. It was either a hundred and seventy one or a hundred and seventy two head. I disremember. One hundred and seventy two head of them I had gathered at that time and put on feed.

196 Q. Who was present at this round up?

A. Mr. Stone was there, a boy that worked for me by the name of Bower, and two or three of Mr. Stone's men were there that helped make the round up.

Q. Did you make any attempt at a gun play at Mr. Edmisson at that time?

A. I did not, no sir.

Q. Did you have a gun with you at that time?

A. Yes sir, I had a gun.

Q. Did he have one also?

A. I think so.

Q. That was rather a common thing, wasn't it, to carry a gun?

A. Seemed to be. I didn't see anybody in that country without them when I went over there.

By the COURT: It is not so common now.

Q. Mr. Gober, did you receive any cattle that Mr. Bryson had in his charge when he left the business to you?

A. Yes sir, I got seventeen head from the sheriff of Woodward county.

Q. Those were the cattle that were taken from Mr. ——?

A. Bryson, for taxes.

By Mr. SWINDALL: Your Honor, that is certainly objectionable. We ask that be withdrawn from the consideration of the jury as incompetent, irrelevant and immaterial.

By the COURT: No, I think that is competent.

By Mr. SWINDALL: Well, we except.

By the COURT: It is competent to show the facts.

By Mr. SWINDALL: I didn't understand he was—that he ever saw those cattle, the seventeen hundred and ten.

197 By the COURT: Who ever saw them?

By Mr. SWINDALL: Sir?

By the COURT: Who ever saw them?

By Mr. SWINDALL: This witness.

By the COURT: Why, possibly this witness may not have seen them, but that would not make any difference.

By Mr. SWINDALL: Don't pretend to know where they came from or what bunch.

By the COURT: Perhaps not.

By Mr. YOUNG: I believe that is all I desire to ask him now.

By the COURT: Cross examine.

Cross-examination by CHAS. SWINDALL:

Q. Mr. Gober, you say you didn't make any attempt to pull your gun on Edmisson, Mr. Edmisson, at the time he came there?
A. No, sir.

By the COURT: Oh, that is immaterial, gentlemen. The question is whether or not he got the cattle and what number there was there. I do not want to get off on side issues.

Q. Do you remember testifying at Kansas City, Missouri, on the case of the Drumm-Flato Commission Company *versus* the Gerlach Bank?
A. Yes, sir.
Q. Now, I will ask you if this question wasn't asked you there in the trial of that case, "What did you do with those you did not ship that you got in?" Answer, "Two hundred and ten head, Mr. Young come out there and counted and sold and I paid him twenty dollars a head for them."
A. Yes, sir.
Q. You remember making that answer?
A. Yes, sir.

Q. I will ask you then if this question wasn't asked you:
198 "Two hundred and ten head of the three hundred and seventy five head?" Answer: "Yes, sir."
A. No, sir.
Q. You didn't make that statement?
A. I don't remember of any question being asked me about three hundred and seventy five head.
Q. "Two hundred and ten of the three hundred and seventy five head?" Your answer: "Yes, sir."
A. Don't remember of any three hundred and seventy five head proposition at all.
Q. Did you ever have a conversation with Mr. John J. Gerlach, cashier of the Gerlach Bank at Woodward, Oklahoma Territory, in regard to how much you were to get per head for shipping these cattle?
A. I don't think I did.

By Mr. YOUNG: That is objected to as incompetent, irrelevant and immaterial.
By the COURT: Well, I do not know where it will lead.
By Mr. SNODDY: Goes to the number of cattle, your Honor.
By the COURT: I think I see where it is drifting. I will allow it to be answered for the present.

Q. Now, I will ask you if you didn't testify at Kansas City, Missouri, in the case of Drumm-Flato Commission Company *versus* the Gerlach Bank, in answer to the following question by Judge Robinson: "Now about the time you were employed by the Drumm-Flato Commission Company to help gather these cattle, didn't you tell John J. Gerlach in the Bank at Woodward that if you had good success and come out to your expectation in gathering these cattle, you would make from a thousand to fifteen hundred dollars at the

time," and your answer: "Yes, sir, for the simple fact that I got three dollars a head for gathering the cattle."

199 A. I don't know about the conversation with Mr. Gerlach. I wouldn't say that I did or did not have, but I might have had such a conversation, taking into consideration the number of cattle we had got and the number of cattle that the mortgages called for, I might of estimated it a good deal better; that is all I had to go by, of the number of cattle then.

Q. But was this question asked you: "Now, about the time you were employed by the Drumm-Flato Commission Company to help gather these cattle, didn't you tell John J. Gerlach in the Bank at Woodward that if you had good success and come up to your expectations in gathering these cattle you would make from a thousand to fifteen hundred dollars at the time," and your answer: "Yes, sir, for the simple fact that I got three dollars a head for gathering the cattle."

A. It might possibly be that I had such a conversation with Mr. Gerlach, as I explained.

By the COURT: Make how much, you say?

By Mr. SWINDALL: Thousand to fifteen hundred dollars, he was to get.

Q. Now, Mr. Gober, I will ask you if it is not a fact you testified as a witness in the case of Drumm-Flato Commission Company *versus* R. C. Edmisson, at Liberty, Missouri, about a month ago, some time along the first of March?

A. Did I testify?

Q. Yes, sir.

A. Yes, sir.

Q. You remember testifying do you?

A. Yes, sir, I do.

Q. Now, I will ask you if you don't remember that the question was asked you by Judge Robinson at that time, that if you didn't state in a former trial of this case at Kansas City that you

200 was to get—that you would make from a thousand to fifteen hundred dollars out of gathering these cattle, and you said "Yes, sir," for you was to get two dollars a head for gathering these cattle?

A. I stated the original contract was two dollars a head, which it was, but afterwards, finding the cattle scattered in different places, and expenses so much greater than expected, the company allowed me three dollars a head.

Q. Yes, sir, but didn't you answer Judge Robinson's question at Liberty, Missouri, you would make a thousand to fifteen hundred dollars out of it and that you was to get two dollars a head?

A. I don't remember just how I answered it.

Q. You don't remember stating you was to get two dollars a head?

A. Yes, sir, I remember that.

Q. There at Liberty, Missouri, in the trial of that case?

A. Yes, sir.

By the COURT: When was that?

By Mr. SWINDALL: About a month ago.

Q. Now——

A. Those statements was only suppositions, Mr. Swindall, understand. I made no statement to anybody after the cattle had been gathered, of that kind.

Q. Yes, sir, you didn't tell Mr. Gerlach that you had been gathering these cattle there in Woodward County, along in January or February, 1900, and you had a good thing out of that, and you would make a piece of money?

A. No, sir, I did not.

Q. Now, Mr. Gober, wait a minute. Now, Mr. Gober, isn't it a fact instead of buying two hundred and ten head of cattle from Mr. Young, you bought and paid for two hundred and ten head, and took a bill of sale of the remainder of the Edmisson herd?

201 A. It is not, sir.

Q. Didn't you buy the remainder of the Edmisson cattle?

A. I did not. I bought the two hundred and ten head that Mr. Young counted to me; was supposed to be the Edmisson cattle.

Q. So you got all the cattle left on the range after that?

A. No, sir, I did not.

Q. Did you ever reside at Amarillo, Texas?

A. Yes, sir.

Q. Were you ever indicted in Potter County, Texas, for murder?

A. Yes, sir, I was.

Q. You are sure then you were not to get the entire remainder of the Edmisson herd that was left on the round up?

A. I am, sir.

Q. Did you have a round up in your pasture along in July, June or July, 1900?

A. Why, I expect so, I don't remember any particular time.

Q. Do you remember having a round up there at one time when you were shipping some cattle to Kansas City, at the time Mr. John F. McFadden was present?

A. I don't remember Mr. McFadden being present. I think, now, the latter part of June I shipped the Smith-Chadbourne and Company cattle out.

Q. Now, you stated a while ago you bought two hundred and ten head of cattle?

A. Yes, sir.

Q. From Mr. Young?

A. Yes, sir.

Q. Is that the Mr. Young that is attorney here for the plaintiff company?

A. Yes, sir.

Q. Defendant company. And you shipped all the rest of

202 this three hundred and twenty six head of cattle to Kansas City, except about sixteen head? Fifteen head?

A. I think about seventeen head died during the winter.

Q. Seventeen died?

A. Yes sir.

Q. Now, I will ask you if it is not a fact that this question was

asked you at Kansas City at the trial of the case of the Drumm-Flato Commission Company *versus* the Gerlach Bank, "What was left, you had charge of the cattle down there and then Mr. Young come out and sold—come out there and sold them to you?" And your answer: "What was left of them that wasn't fat to go on the market." Question: "Had there some been shipped in?" Your answer: "Yes sir, one hundred and fifteen head?"

A. I don't remember about that sir, and if the first shipment of those cattle was made at the time——

By Mr. SWINDALL: Just answer this question.

A. Well, I don't remember about the question.

Q. You don't remember that you shipped one hundred and fifteen head of these cattle?

A. No sir, I don't remember making that statement.

Q. Your recollection of the subject at that time was as good as it is now, was it?

A. Well, I suppose so, yes.

Q. If you made such a statement as that, was it true or false?

A. If I made the statement it was true, sir.

Q. Did—after you were employed by the Drumm-Flato Commission Company to gather up these cattle, did you round up the entire Smith-Maxwell-Morris pasture and get all of the Edmisson cattle you could find in there?

A. Yes sir.

Q. Did you round up the north and west side of this
203 pasture and get all of the cattle out of it?

A. Yes sir, I did.

Q. And take all the cattle out of that pasture you could find?

A. Yes sir.

Q. Now, about what time did you take those cattle out of the Smith-Maxwell pasture?

A. From the latter part of December up to the seventh of January. Was continually working over the range. If your Honor please, the gentleman asked me a question that I would like to explain. I would like to make an explanation.

By the COURT: You will get a chance as soon as you get through.

By Mr. SWINDALL: I didn't understand.

By Mr. YOUNG: Are you through with the witness?

By Mr. SWINDALL: I don't know.

Q. How many men did you have in your employ helping you gather these cattle?

A. I had three men of mine and Mr. Maxwell and Morris at the time, from their outfit, assisting me. We were working cattle together, you might say in the same range.

Q. Did you have a man working for you at that time by the name of C. B. Caps?

A. No sir, not at that time.

Q. Did you have a man working there by the name of C. B. Caps, working cattle?

A. No sir, I employed a man by the name of C. B. Caps, he was

working for Mr. Edmisson, and I employed him; he told me where several of these bunches of cattle were.

Q. Did Mr. Edmisson ever inform you that these cattle were off at these places when you asked him?

A. I never asked.

Q. Now, didn't you state at Liberty, Missouri, after you got
204 these cattle in your possession, you tried to trip Mr. Edmisson and you asked him if he didn't have some cattle down at Mr. Fuller's place and these other places, and he stated he did?

A. No sir, I stated——

By the COURT: What is the difference? That is not an issue here.

A. I asked him about the cattle at Mr. Albright's place, after I found out they were there, and he knew I had found it out, and he said he sent them there on feed.

By the COURT: I do not think that has anything to do with this matter.

Q. Did you have complete control of the Smith-Maxwell-Morris pasture after you took those Edmisson cattle?

A. No sir. Of the Smith and Chadbourne interest.

Q. That was the north side?

A. Yes sir.

By the COURT: There is no issue here that Mr. Edmisson refused to turn these cattle over?

By Mr. YOUNG: Yes sir, that he never turned over any cattle under this contract.

By the COURT: That he refused to turn over the cattle?

By Mr. SWINDALL: No sir.

By the COURT: I have not heard anything of that. This witness does not claim he said anything about it.

By Mr. SWINDALL: The contract doesn't say he was to deliver them.

By the COURT: I suppose it would properly be inferred he was to deliver them.

By Mr. YOUNG: I want to ask Mr. —— some questions.

By the COURT: What I mean is this, gentlemen: This is drifting off into some side issues here, and I don't see where it can become material.

205 By Mr. YOUNG: We are simply showing where we found these cattle when we tried to gather them up.

By the COURT: That is all right, but whether they were placed there with any design is immaterial.

By Mr. YOUNG: Our object is, we had to go to several places to get these cattle, and Mr. Edmisson didn't tell about it and didn't deliver all the cattle under this contract.

Q. Mr. Gober at the time you were in the employ of the defendant you were authorized to gather these cattle in what way—under the contract or under the mortgage?

By the COURT: How can that be in issue here? How can it be in issue. Of course, the court does not care to object.

By Mr. YOUNG: There was this thing about it, your Honor. After the failure to deliver the number of cattle that the contract

called for, of course the contract then was supposed to have been abandoned by Mr. Edmisson.

By the COURT: Did you offer to rescind?

By Mr. YOUNG: Offer to rescind the cattle? We never had an opportunity.

By the COURT: You will have to show that fact before you can claim anything under the mortgage. You made a subsequent contract here, which is binding on both parties, when you bought the cattle. Now you cannot use one horn of the dilemma by taking seventeen hundred and ten head, and turn around and repudiate the contract without placing the parties in *statuo quo*.

By Mr. YOUNG: That is not an issue at all, your Honor. There has been some questions brought out here——

By the COURT: What does the answer set forth?

By Mr. YOUNG: The answer sets out——

By Mr. SWINDALL: The answer, amended answer pleads a
206 failure of consideration of the contract.

By Mr. YOUNG: Just pardon me, Mr. Swindall, pardon me, just a moment——

By the COURT: I am talking to Mr. Young now.

By Mr. YOUNG: To enlighten your Honor, this answer was filed immediately after this suit was brought in April, 1900, and at that time we didn't know there was quite a number of these cattle that had not been accounted for, and we set up in this answer a failure of their performance of the contract, and asked that our mortgage be foreclosed and that a receiver be appointed for the balance of these cattle that had not been disposed of, but as it turned out, there wasn't any balance to be disposed of. That is the substance of the answer.

By the COURT: Wasn't any balance?

By Mr. YOUNG: Wasn't any cattle discovered after this suit was brought. We supposed there was a good many cattle in the country at that time, but it has proved there wasn't, and there has been no receiver appointed under the action to foreclose this mortgage.

By the COURT: Then that feature is out of the case. Now, what do you say about the contract? You admit the contract, I suppose?

By Mr. YOUNG: We established that they failed to comply with this contract, that is about all that is left of this contract. They failed to deliver the number of cattle in this contract.

By the COURT: If that is the contract, then how can you keep what you did get and at the same time repudiate the contract?

By Mr. YOUNG: We are not trying to repudiate it.

By the COURT: If you are claiming under the mortgage you are.

By Mr. YOUNG: Well, I ask for a foreclosure of the mortgage.

By Mr. SWINDALL: Your Honor, I want to make a little correction of the time of filing this answer. The first answer was
207 filed in April, 1900, and one in October, 1900; and the one they are trying on was filed in November, 1900, and there is nothing intimated in this answer about a rescinding of the contract. They simply deny any liability under that contract, they did that before and that question——

By Mr. YOUNG: The Supreme Court says the contract was good and we are accepting that proposition.

By the COURT: The question has been in the Court's mind for some time as to what the issues were in this case.

By Mr. SWINDALL: There are the pleadings. That is all there is in the answer. I take it from the statement here there is no dispute about the petition except as to the number of cattle he claims they got.

By Mr. YOUNG: That is the issue at the present time.

By the COURT: I do not see where the question of the mortgage has anything to do with the issues in this case. In the first place you made a contract which the Supreme Court has held is binding and valid. You received some cattle under that contract. There are two remedies, either of which——

By Mr. SWINDALL: We understand the issues, your Honor, as made by the Supreme Court, there is one question here only, the amount of damages, if there is any, the amount of damages; that is all there is in the case.

By Mr. YOUNG: Well, I withdraw the question. The only thing the contract calls for the cattle mentioned in this mortgage.

By the COURT: Yes sir, but whether they gathered them under this contract at the instance of the parties under this contract, or whether they gathered them under the mortgage, is immaterial. I want to keep the other propositions out; just so he gathered them, that is the only proposition.

By Mr. YOUNG: Haven't shown the cattle we were gather-
208 ing and shipping are the cattle included in this mortgage. I am trying to identify the cattle.

By the COURT: I suppose there is no dispute about that, that they are all the cattle.

By Mr. YOUNG: That is, being the same cattle as the cattle under the mortgage.

By Mr. SWINDALL: That is what we have been trying to identify them as.

By the COURT: The Court has taken it so.

Redirect examination by Mr. YOUNG:

Q. Now, Mr. Gober, Mr. Swindall asked you if you were not indicted for murder at Amarillo, Texas. I will get you to state whether you were tried and acquitted?

A. I was.

Q. I will ask you were you an officer at that time?

A. I was sheriff of the county.

Q. Now, Mr. Gober, along in July or August, 1900, how many cattle did you have in your pasture where you were keeping these Edmisson cattle or the cattle in controversy?

A. Something over seven hundred head.

Q. What were the brands on these cattle?

By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.

By the COURT: Oh, I think it is immaterial, but I think it is competent. You stated he had other cattle there. I think they may explain to show the conditions and surroundings. It may be immaterial.

By Mr. SNODDY: There is no pretence on our part, except those we had our brand on, that we had any claim on them at all.

By the COURT: Objection overruled.

Q. About how many? I didn't get your answer, Mr. Gober?

209 A. I had some in the brand Lazy H, and some what we call a —— seven, some with T V and some with Cross L. Those were the Smith-Chadbourne Company cattle, about four hundred and twenty five head of those.

Q. And these X-2-Bar cattle and 55, the cattle in controversy?

A. Yes sir, they were all worked and handled together.

By the COURT: You took these cattle and the other cattle to make up the seven hundred?

A. Yes sir.

Q. Now, Mr. Gober, I will ask you whether or not at the time these cattle were counted to you and sold to you by the defendant company in August, '99, whether or not these cattle were rounded up at that time?

A. Yes sir, they were rounded up and the pasture worked thoroughly for the purpose of getting a tally on the cattle.

Q. And counted to you then, two hundred and ten head?

A. Yes sir.

By Mr. SNODDY: Well, we object to being bound by a conversation between Mr. Young and this witness.

By the COURT: I don't suppose you would be bound by it at all. What was that last question?

Last preceding question and answer read to the court by stenographer.

By the COURT: Proceed, gentlemen.

By Mr. SWINDALL: That all, Mr. Young?

By Mr. YOUNG: I believe that is all.

By the COURT: Anything more on cross examination? Stand aside Mr. Gober.

By Mr. YOUNG: Wait a minute. One further question.

Q. Mr. Gober were you present at the time Mr. Bryson was rounding up these pastures over there and these cattle?

A. Yes sir, I was present at the last round up that was made

Q. About what time was that, if you remember?

A. That was along the latter part of November or the first

210 of December, as well as I remember.

Q. Were those cattle rounded up? Where were they rounded up?

A. They were rounded up in the pasture that Mr. Edmisson's house was in, the pasture he claimed. I believe Mr. Maxwell and Morris also claimed it.

Q. Well, were the cattle worked when they were rounded up at that time?

A. Yes sir.

Q. Thoroughly worked?

By Mr. SNODDY: Objected to as leading and suggestive.

By the COURT: How do you mean, worked?

By Mr. YOUNG: I mean, strays cut out. I think that is what the cattle men call it, worked.

A. They wasn't up to the time I left the round up. I left the round up about three o'clock in the evening.

Q. Where did the cattle go when you left the round up? Where did they go with the cattle?

A. Well, I don't know. I couldn't tell only by hearsay, because I didn't see them go.

Q. You left the round up you say about three o'clock?

A. Yes sir.

Q. Was there not arrangements for a continuation of that work by anybody?

A. Mr. Bryson rode out to me and some of Mr. Morris' men and said the cattle——

By Mr. SWINDALL: Wait a minute. We object to any conversation.

By the COURT: Yes, any conversation would be incompetent.

By Mr. YOUNG: Would be incompetent?

By the COURT: Yes sir.

By Mr. YOUNG: He was the representative of the defendant company.

By the COURT: Yes sir, but it was a self serving declara-
211 tion. But if it was a statement made against his own interest——

Q. I will ask you what they did with this bunch of cattle later on. Did they quit work at three o'clock?

By Mr. SNODDY: Let's see what the witness knows first.

By the COURT: Yes, if he knows.

A. Because the cattle were dry for water, is the way I understood it.

By Mr. SNODDY: Now, it is a question of whether he understood it wrong or not.

By the COURT: Oh, gentlemen, there is no use being so technical about this. It is only a different way of putting the same proposition.

By Mr. SNODDY: Only what the man in charge of it said might——

Q. You positive the cattle were not thoroughly worked out at that time?

A. No sir.

Q. Was there any of them cattle left in that round up at that time?

A. I don't know whether there was any in there or not.
Q. Well, did you make an effort to work them after that?
A. Yes sir, I sent a man next day with Mr. Morris' men to work the herd.
Q. Where did they go to the next day to work these cattle?
A. Mr. Robert's pasture.
Q. Did your men get any cattle from that pasture?
A. Yes sir.

By the COURT: Do you know?
By Mr. SNODDY: Wait a moment.
By the COURT: That is evidently hearsay, unless it happens he knows of his own knowledge. He may know of his own knowledge, I don't know. But he says he sent a man, and I suppose that man would be the proper person to testify, unless this man knows something further than is indicated by his examination.
By Mr. YOUNG: Take the witness.

212 Cross-examination by CHAS. SWINDALL:

Q. Were you there at the round up in Robert's pasture the second day?
A. No sir, I was not.

By the COURT: That all, gentlemen? Stand aside. Call your next witness.

Witness excused from the stand.

J. M. BARCLAY.

J. M. BARCLAY, called as a witness on behalf of the defendant in the above entitled action, being first duly sworn, testified as follows:

Direct examination by O. G. YOUNG:

Q. Mr. Barkley, you acquainted with Mr. Edmisson?
A. Yes sir.
Q. You acquainted with the Drumm-Flato Commission Company people, also, the defendants?
A. Yes sir.
Q. Do you know Mr. Edmisson's brand?
A. Yes sir. I know them as they were rendered to the Association. He may have some other brands that I don't know nothing about.
Q. What were his brands Mr. Barkley?

By Mr. SNODDY: Just wait a moment. We object to that as incompetent, irrelevant and immaterial. He doesn't say how they were rendered. Very indefinite. And he says they were rendered to the Company.

By the COURT: The question is now, what were they? You only know what somebody told you?
A. No sir, I know his cattle by seeing the cattle and also by the brands in the book. We are furnished books with the brands. Mr.

Edmisson had some cattle in the brand X-2-Bar, on the left side, hip, with two (2) on the jaw. He had some cattle branded 55 on the left side. Some branded 55 with a little bar under it.
213 He had some cattle branded J W on either side. Some of them had a figure five on the hip and he had some cattle branded B S on the left side. His horse brand was 2 on the jaw.

Q. Any branded J W?

A. What is that?

Q. Any branded J W?

A. He had some branded J W on either side.

Q. Did you assist Mr. Gober in gathering these cattle, any of them?

A. No*t* sir.

Q. I say, did you assist Mr. Gober in gathering these cattle?

A. Yes sir.

Q. Did you ever have any conversation with Mr. Edmisson about these cattle, about his delivering these cattle?

A. Yes sir.

Q. State what it was, Mr. Barkley.

A. On January the first, 1900, I moved up to Woodward. Woodward is my headquarters. And Mr. Gober come to me and requested me to come down with him in Dewey County for a bunch of cattle down there. There was some that Mr. Edmisson had put on feed down there. We went down there and got those cattle, and when I was there, we was there, we arrested a gentleman by the name of Guthrie or some such name for running off these cattle.

By the COURT: Wait a moment. You need not testify anything about whom you arrested.

A. Well, I wanted to explain the conversation.

By the COURT: Well, you will not explain any more about it. You answer the question. What was your conversation with Mr. Edmisson?

A. After we got these cattle, I had a—read that again.

Question read by stenographer.

By the COURT: That is, what Edmisson said to you.

A. Well, you wanted me to state when it was. I believe they asked me to state when it was.

214 Q. Give the conversation.

A. Why, I was talking to Mr. Edmisson at Woodward, I think it was at Woodward, and I advised him to turn over the rest of these cattle and get his paper back and get on his feet and he told me that this bunch of cattle we got at Albright's was all the cattle he knew where they was.

Q. That was all the cattle he had at that time?

A. Yes sir.

By the COURT: Oh, that is leading. Gentlemen, we will have to apply the rules here.

Q. Where was this conversation, Mr. Barkley, and when?

A. Some time in January?

Q. You assisted in helping to gather some other of these cattle did you?

A. Yes sir. You want to know where they was at?

Q. Yes sir.

By Mr. SNODDY: Just wait until he asks you.

ERSKINE SNODDY: I don't think he ought to lead this witness. He seems to be leading the attorney.

Q. Where were they, Mr. Barkely?

A. We got a bunch at Albright's, the next bunch we got at Fuller's, Fullers; that is two. We got a bunch at Frank Brown's; we got a bunch at Josh Holmes (?), and a bunch at Mr. Enfield's, over east of here.

Q. Where—were you about Mr. Edmisson's premises there, in December, 1900?

A. No sir.

Q. In January?

A. I was in there through there in January, February and March.

Q. Did you see any of these cattle that Mr. Gober did not get?

A. No sir.

215 Q. Were you with Mr. Gober the time he got the cattle at the Edmisson pasture, the sixteen head that he testified to?

A. No sir.

By Mr. YOUNG: I believe you may take the witness.

Cross-examination by CHAS. SWINDALL:

Q. You don't know how many other cattle Mr. Gober got at the time when you helped him gather, do you, Mr. Barcley?

A. I saw two hundred and thirty four head he had on feed.

Q. I say, you don't know how many cattle he got except these cattle you helped gather and the ones you saw on feed there?

A. No sir, no sir.

Q. You say you are inspector for the Texas Cattle Raisers Association?

A. Yes sir.

Q. Did they send you out there to help gather these cattle for Mr. Gober?

A. I went out.

Q. I am asking you if the Association sent you out there to gather these cattle?

A. If you will let me answer the question the way I want to——

By the COURT: You answer the question.

A. Yes sir.

Q. You had instructions from the secretary of the Association to go out and gather these cattle, did you?

A. Go out and gather these cattle that belonged to members of the Association that were being illegally handled, and that included all the cattle that belonged to Mr. Gober as well as any others.

By the COURT: Being illegally handled?

A. Yes sir.

By the COURT: What do you mean by that?

A. Well, being handled by them that didn't have any rights to handle them.

216 Q. You are connected with this Association?

A. Yes sir.

Q. And you are connected with these commission companies as agent?

A. No sir.

Q. Didn't you make an affidavit in Day County that you were agent for the Boston and Kansas City Loan Company?

A. Yes sir.

Q. And took about thirty one head of cattle from one C. S. Shubert?

A. Judge, I would like to have time to answer. I would like to explain.

By the COURT: He will give you time to answer the question. I do not want any more talk that way. You will answer the question and the court will see that you get all your rights. The only thing that this witness has testified to, so far as the Court can see, is upon exactly the same matters the plaintiff himself has testified. Possibly there may be this bunch over east that he did not testify to, that one bunch, so why is there any dispute about this witness's testimony?

By Mr. SWINDALL: There is something in here of denying a conversation he had with Mr. Edmisson.

By the COURT: Now, this witness says Mr. Edmisson told the witness of this bunch of cattle down here, that they were all he knew where they were. That might be true, but even if it is not true, what figure does it cut here?

By Mr. SNODDY: We don't know, but we presume they wouldn't have brought it out unless it was incompetent, irrelevant and immaterial.

By the COURT: The Court would have sustained an objection to it if you had objected to it. The court is not going to labor with anything that does not come up.

By Mr. SNODDY: There is a voluntary statement here about the cattle being illegally handled.

217 By the COURT: I don't care anything about that. It may be stricken from the record if you wish it.

By Mr. SWINDALL: I ask that it be stricken from the record.

By Mr. YOUNG: I don't understand that the witness volunteered it.

By the COURT: That he was sent by the Association is probably immaterial. It is simply a question of whether he was sent by Mr. Gober or anybody else but what for is immaterial. Proceed, gentlemen.

By Mr. SWINDALL: What will we do with this last question? I don't want to ask any question against the rules of the court——

By the COURT: You may ask any questions you please, Mr. Swindall.

Q. Mr. Barkley, I will ask you if you were not indicted in Day County, in 1902, for obtaining property under false pretences?

By Mr. YOUNG: We object as incompetent, irrelevant and immaterial, trying another case not in issue here.

By the COURT: You can ask the question whether or not he was convicted.

By Mr. YOUNG: Did you allow the question to be asked that he was indicted?

By Mr. SWINDALL: That is all.

Witness excused from the stand.

J. F. BRYSON.

J. F. BRYSON, called as a witness on behalf of the defendant in the above entitled cause, being first duly sworn, testified as follows:—

Direct Examination by O. G. YOUNG:

Q. Mr. Bryson, are you acquainted with Mr. Edmisson, the plaintiff in this suit?

By the COURT: Just excuse me a moment, will you? Gentlemen of the Jury, we will take a recess for five or ten minutes. During the time you are out, remember the admonitions the court has heretofore given you. You may be in your seats at the end of the recess.

Here the court took a recess of ten minutes, after which recess the trial of the above cause was proceeded with. Jury all present.

218 By the COURT: Proceed, gentlemen.

By Mr. YOUNG: If your Honor please, we desire to excuse Mr. Bryson for the present.

Witness Bryson excused from the stand.

By Mr. YOUNG: R. E. Stone.

R. E. STONE.

R. E. STONE, called as a witness on behalf of the defendant in the above entitled cause, being first duly sworn, testified as follows:—

Direct Examination by O. G. YOUNG:

Q. Your name, Mr. Stone.

A. R. E. Stone.

By the COURT:

Q. R. E.?

Z. R. E.

Q. Well, are you acquainted with the plaintiff, Mr. Edmisson?

A. Yes sir.

Q. Where did you reside in the fall of 1899?

By Mr. MARUM: Objected to as incompetent, irrelevant and immaterial unless it is after the date of this contract.

By the COURT: That is preliminary, gentlemen, go on.

A. I was in Woods County, Woodward County; lived in Woods county.

Q. How far were you residing from Mr. Edmisson his premises or ranch?

A. Well, straight from headquarters, I guess it was about four or five miles.

Q. You were acquainted with his ranch and cattle, were you?

A. Yes sir.

Q. I will ask you, Mr. Stone, if you were present at a round up or two rounds ups that were had in November or the latter part of November or the first of December, 1899?

219 A. I was at one that Mr. Bryson was, his round up I was. At one of them only.

Q. Do you remember whether it was the first or the last one?

A. It was the first one I think.

Q. The first round up?

A. Mr. Bryson had charge of it. I think so, yes sir.

Q. Well, who had charge of that round up, the first one, was it?

A. Mr. Bryson had charge of the one I was with, that I went to.

Q. Were you present at any counting of any cattle over there?

A. No sir, I was not.

Q. Well, were you present at any round up where Mr. Edmisson was present after that, after the first of December or after Mr. Bryson rounded up?

A. Yes sir.

Q. Where was this round up?

A. It was one of Mr. Gober's round ups on Main Creek.

Q. Was Mr. Edmisson there?

A. Yes sir.

Q. You remember of any X-2-Bar and 55 cattle that Mr. Edmisson had being counted out of this cattle at that time?

A. I do, yes sir.

Q. Do you know anything about whether Mr. Edmisson counted those cattle at that time?

A. After they were cut?

Q. Yes sir.

A. Yes sir.

Q. Who else was present in the count, participated in the count?

A. Mr. Gober.

Q. Was Mr. Edmisson at this round up during the entire time or from start to finish?

220 A. Yes sir. That is, he was there when I left. I left when the cattle started.

Q. You were present then when this count was had by Mr. Gober and Mr. Edmisson?

A. Yes sir.

Q. You remember what particular number of cattle was counted out there at that time?

A. Well, sir, I couldn't be positive to the exact number. I could only make a guess at it.

Q. You don't recollect?

A. No sir, I don't recollect the exact amount at all. Don't know as I asked either party.

Q. But you know they counted those cattle there at that time?

A. They were counted, yes sir.

Q. Mr. Gober made no resistance, did he, to Mr. Edmisson——

By ERSKINE SNODDY: That is objected to as leading.

By the COURT: Oh, yes.

By Mr. YOUNG: There is a great deal more in their petition——

By the COURT: What if any resistance was made? Ask your question that way.

Q. What resistance, if any, was made to Mr. Edmisson cutting out cattle out of that round up, or counting these cattle, if any?

By Mr. SNODDY: Objected to as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

A. Why, I don't know of any, sir.

Q. There wasn't any attempt by either Mr. Gober or Mr. Edmisson to get into a row, was there?

By ERSKINE SNODDY: That is objected to as leading.

By the COURT: Objection sustained.

221 By Mr. YOUNG: Well, your Honor, they lead in their petition.

By the COURT: Well, you can get at all of that without being leading. There is no question in the world about that.

Q. Well, did you hear the conversation that occurred between Mr. Edmisson and Mr. Gober that day?

A. Why, no sir, never heard no conversation exactly. I heard——

Q. Did he go into the herd and cut out any cattle, exercise any rights there?

A. Yes sir.

By Mr. SWINDALL: Objected to as leading and suggestive.

Q. Well, state what he did.

A. Well, he was there looking after those cattle, and he helped work the cattle the same as I did. I was there representing Maxwell and Morris.

Q. Well, you say he helped work the cattle. Now, what did he do?

A. Well, he helped cut the cattle and count the cattle, the last time I seen him. Playing the same part anybody else would, and turning cattle that had got in, playing the same part anybody else would that had any interest in them.

Q. Can you approximate the number of cattle that were counted out of the Edmisson cattle that day?

A. Well, I could only make a guess at it; between a hundred and sixty, may be, and two hundred head; may be that, as well as I remember. I wouldn't say positive, I ain't sure; been too long ago.

Q. You know where Mr. Gober took these cattle?

A. Yes sir.

Q. Where did he take them?
A. Took them and put them on feed on the Cimarron.
Q. About what time of the year was this?
A. It was along the first of January some time, between the first and tenth, as well as I remember; fifteenth.

222 By Mr. YOUNG: I think that is all.

Cross-examination by CHAS. SWINDALL:

Q. What time you say you left this round up, Mr. Stone?
A. Left which round up?
Q. The round up where Mr. Gober and Mr. Edmisson were?
A. I left it when the cattle did, when they turned it loose.
Q. You didn't leave it until after they turned it loose?
A. No sir, I didn't; they just left the cattle there, all except what Mr. Gober cut to take away.
Q. You know whether Mr. Gober had another round up after that about that time that you wasn't present?
A. That I wasn't present?
Q. Yes sir.
A. Well, they might have been.
Q. They had several round ups about that time, didn't they?
A. Yes sir, they did. They had lots of round ups I wasn't present at, but they generally had somebody there.
Q. You don't know how many cattle Mr. Gober turned back into there off of feed in the spring of 1900, do you?
A. Turned back to feed?
Q. In Gober's pasture of these cattle, Edmisson cattle, along in 1900?
A. No, I couldn't tell you, ain't positive, but I believe I helped Mr. Gober put the cattle in the pasture, I won't be positive of that.
Q. You don't know how many were there at the round up in July of the Edmisson cattle in July, 1900, do you?
A. No sir.
Q. You and Mr. Edmisson were not on very good terms at that time, were you, Mr. Stone?
A. No sir.
223 Q. You were not?
A. No sir.
Q. You had had some trouble over a pasture, hadn't you?
A. Well, no trouble at all.
Q. You were unfriendly and that had grown out of pasture relations, hadn't it?
A. Well, we were not friendly.
Q. There was ill feeling existing between you at that time?
A. Well, I didn't have anything to do with Mr. Edmisson and he didn't have anything to do with me.
By the COURT: You can answer the question, straight out, whether there was any ill feeling between you, particularly on your part.
A. No sir, there wasn't any on my part, not as far as my part is concerned.

Q. You were looking after it as manager of the company, were you not?

A. I was.

Q. Had Mr. Gober removed from there at that time?

By the COURT: He said he was.

Q. Were you armed, and was Mr. Gober armed there at that time?

By the COURT: He said he was.

Q. Were you armed?

A. I was not.

Q. You say the cattle were turned loose there after this round up was made?

A. The cattle were just rode off and left.

Q. All turned back together just as they had been?

A. Not all turned back together; that is, they cut out some, and these they cut out wasn't turned back into the others.

Q. How many did you cut?

A. I didn't cut out any. They were in the pasture there.

224 I didn't have any to cut.

Q. Just went over to be present at this round up?

A. Yes sir, I did.

Redirect examination:

Q. Did Mr. Edmisson cut out and drive away any at that time?

A. And drive away any?

Q. Yes sir, from the herd at that time?

A. No sir.

Q. Now, you say you helped Mr. Gober put those cattle on feed. What time, do you remember?

A. Well, that was along, as I stated, between the first and tenth of January; I won't be positive.

Q. Can you give the jury an estimate of how many were put on feed?

A. Of what I seen?

Q. Yes sir, of what you saw there.

By Mr. SNODDY: Well, we object to that. He said he didn't know several times, to the number he put on feed.

Q. I mean, of these cattle.

By Mr. SNODDY: Well, of these cattle; he doesn't know whether they were all put on feed or not.

By Mr. YOUNG: Well, he certainly knows about how many were put on feed.

By Mr. SNODDY: We are not charging you simply with the cattle put on feed here.

By Mr. YOUNG: I want to know about how many were put on feed.

By Mr. SNODDY: We object to it as incompetent, irrelevant and immaterial.

A. Must I give it?

By the COURT: I think it is immaterial how many were put

225 on feed, unless it has some bearing, helps to show how many he had altogether. There is no division here any way that

would make any difference between one class of cattle and another.

By Mr. YOUNG: That is all.

By Mr. SWINDALL: That is all.

Witness excused from the stand.

J. F. BRYSON.

J. F. BRYSON, called as a witness on behalf of the defendant in the above entitled case, being first duly sworn, testified as follows:

Direct examination by O. G. YOUNG:

Q. Mr. Bryson, were you employed by the Drumm-Flato Commission Company in November, '99?

A. Yes sir.

Q. What—in relation to Mr. Edmisson's cattle?

A. I can't understand you.

Q. In relation to Mr. Edmisson's cattle?

A. Yes sir, I was employed by the Drumm-Flato Commission Company to look after these Edmisson cattle, yes sir.

Q. Well, what were you employed to do?

A. I was employed at first to go down there and count these cattle, get a count on them.

Q. About what time was that?

A. Well, I went down there about the third day of October, 1899.

Q. How long did you remain there at that time?

By Mr. MARUM: Objected to as incompetent, irrelevant and immaterial.

A. I was there something over a month. Month.

By Mr. MARUM: October the third is over two months prior to that contract.

A. From near a month, well, a month, near a month.

226 By Mr. YOUNG: Well, this is just leading up to——

By the COURT: Well, it is preliminary.

Q. Were the cattle rounded up at that time?

A. Yes sir, they were rounded up while I was there.

Q. Were they gathered up from the different pastures?

A. Yes sir.

Q. So that I won't be leading, just tell the jury what you did when you went down there and how you did it.

By Mr. SNODDY: Now, Mr. Young, does this relate to gathering these cattle in October?

By Mr. YOUNG: Relates to October, yes sir. Was it in October or November, Mr. (((?

A. Well, when I went down there first to do this work, it was in October.

Q. In October?

A. Yes sir, when I went down to get the cattle.

Q. Yes. Well, state what you did, in detail, to the jury.

By Mr. SWINDALL: We object to that as incompetent and immaterial.

By Mr. SNODDY: And irrelevant.
By the COURT: What is the date of this contract?
By Mr. MARUM: November 22nd.
By Mr. SNODDY: November the twenty second.
By the COURT: What is the purpose of this, Mr. Young?
By Mr. YOUNG: The purpose is, Mr. Bryson went down there and rounded up all these cattle, with a view of making some arrangement about them in the fall, which was followed by this contract.
By the COURT: Suppose that is true, what figure would that cut? You can not ask what he did, if it is something that occurred prior to the contract, some communication between the parties with reference to the matter at that time. It would not be competent here.
227 By Mr. YOUNG: It was a matter leading up to this contract.
By the COURT: Suppose it does.
By Mr. YOUNG: Another purpose is to show this count.
By the COURT: That is what I had in mind. If it has a bearing upon the number of cattle, that might be shown.
By Mr. SNODDY: I don't know whether it has or not.
By Mr. YOUNG: Well, if it does not show that, it is incompetent.

Q. Well, did you—go ahead and state to the jury what you did?
A. Well, I went to Mr. Edmisson's ranch. I left Woodward I think about the third day of October.
By the COURT: Can you not get down to the gist of the matter?
A. I got down to Edmisson's ranch the same day I left Woodward. I introduced myself to him, showed him my letter from the Drumm-Flato Commission Company and stated to him what my business was there, and he says "All right." Said he had the cattle there and we could count them; said he would have to run them up first. Well, during the day he said that he wasn't just ready at that time to run them up, for the man he wanted to do the work, a man by the name of Mosby was busy just at that time and wouldn't be there for perhaps three, four or five days. During that time, why we rode up and worked in what we could, commencing on the east side as far down as he thought his cattle ranged, and worked I think until Mr. Mosby came and when Mr. Mosby came he took charge of the business and worked the cattle. He worked all the pastures surrounding Mr. Edmisson's pasture from the east twenty or twenty five miles, I should think, and south may be the same distance, may be not quite so far. And then we all put those into the Edmisson pasture, and then they worked around north and worked back towards his ranch. And I can't recall that there was very much work done around—there was a small pasture there but that pasture was worked some on the way to the station. That was known as Mosby's pasture. The cattle were all throwed into his pasture. What he claimed to be his pasture was
228 may be five or six miles north and south, and I don't think it would average over two miles east and west, from the county line west. And I can't recall just the date, but one evening, one evening we got the bulk of the cattle into the pasture just south

of his house and put them under herd, and then we went up into the north part of the pasture where Mosby's cattle run and we rounded that pasture or that part of it. We brought those cattle over towards his house. The main herd of cattle rounded up was south of his house, and we had been north, and just before we got to his house, we rounded up this little bunch of cattle we had, and Mr. Mosby took his cattle out and was going to keep them separate. After he did that, I suggested the plan that we tally that bunch of cattle and that if he wanted to take out any beef for shipment, to take them out and put them in Mr. Mosby's pasture, and we would tally the remainder and throw them back. What I mean by throwing back is to put them back and not get it mixed with this bunch that we had counted. Well, that was all right. And we got through that evening. That finished the work for the day. So this big herd was brought up close to the house——

Q. How many head did you tally of that bunch?

A. Sir.

Q. How many head did you tally of that bunch?

A. I think——

By Mr. SNODDY: Objected to as incompetent, irrelevant and immaterial.

A. I think it was two hundred and fourteen head that we turned back or something like that. I have got it on my book here.

Q. Have you got a tally you made at that time?

A. Sir?

Q. Is that your book you made at that time?

Counsel refers to book in hands of witness.

229 A. Yes, sir, I made a count of it. It was two hundred and fourteen we turned back, and I think there was a hundred and some odd cattle cut out and put into Mosby's bunch for shipping purposes.

Q. Then what did you do with the big bunch?

A. Well.

By the COURT: You don't get it definitely. He says a hundred and some odd.

Q. How many cattle were cut out of there for shipping purposes, do you remember?

A. Got it here on my book, one hundred and sixty nine.

Q. One hundred and sixty nine cut out of two hundred and fourteen head?

A. No, sir, there was two hundred and fourteen head of them throwed back.

Q. Now, what did you do with the big bunch?

A. The big bunch was held there that night, and they were rounded up and held there during the night, what we call night herding them. And the next morning these people that had cattle in this round up, came to the round up and worked the cattle, worked there with their cattle, worked their cattle out, that is, they worked them out as clean as they could, and I suppose got pretty near all of them out of this bunch of cattle. And I suppose four

or five o'clock in the afternoon, probably wasn't later than four o'clock, in the mean time, while these people were working their cattle out, Mr. Edmisson cut out some beef cattle for shipment, and after the bunch was cleaned out and they had got—the neighbors had gone, the party finished cutting out what beef cattle was wanted, then these men got around and helped and we strung the cattle out and counted them.

Q. How many head of them were there?

A. Well, they were counted by ages. I had two or three
230 men there to help me. I wanted to get the classes of them, if I could; they were counted by classes. The classes run: Cows, eleven hundred and one; two year olds, six hundred and thirty; yearlings, three hundred and sixty.

By the COURT: Sixty?

A. Three hundred and sixty; bulls, forty three, and calves, two hundred and seventy five.

By the COURT: That is the entire number of Edmisson cattle in that bunch?

A. That was the total number of cattle in the pasture.

By the COURT: That includes those you say you wanted to cut out for shipment?

A. Including everything; and it also included a second time this two hundred and fourteen head I had thrown back.

By the COURT: Included those?

A. They were put in there a second time and counted a second time. I was cow man enough to notice that and watch it and see whether those cattle were back in there the next day or not, and I found they were enough in there to satisfy me they were in there.

By the COURT: You didn't count them purposely?

A. These cattle turned back, I spotted enough to see whether they were in there or not.

Q. The Court asked you if they were counted purposely by you?

A. They were put in there, yes sir, by some one.

Q. Well, by you? Were they counted in by you?

A. There was cattle in this bunch that were put in this pasture.

Q. This two hundred and fourteen, did you have them put with that big total that night?

A. No, sir, I had them throwed back.

Q. Your intentions was to have them away from the bunch?

231 A. Yes, sir. They would get through and would have drifted back that way if they were let alone, if they let them go that way.

Q. Now, what is the total number you had there of cattle you rounded up?

A. The total number figures up two thousand, five hundred and seventy eight head.

Q. Twenty five hundred and seventy eight?

A. Yes, sir, and out of that there was seven hundred and ninety six shipped the first shipment.

Q. What was that total number?

A. Two thousand five hundred and seventy eight.
Q. Now, what was cut out of that for shipment?
A. The beef cattle that was cut out was seven hundred and ninety six. They are to come out of that total number.
Q. What was done with these cattle?
A. They were shipped to Drumm-Flato Commission Company.
Q. Now, your twenty five hundred and seventy eight, is that the correct tally there?
A. That was not the correct tally because there was two hundred and fourteen head that had been counted on me twice.
Q. Then if you took that two hundred and fourteen head out, that would leave the correct number, would it?
A. That would leave the correct number that was left in the pasture, and counting this seven hundred and ninety six that we shipped.
Q. Then this seven hundred and ninety six were shipped out by Mr. Edmisson and shipped to Kansas City?
A. Yes, sir.
Q. Now, this was about what date?
A. What was the date?
Q. Yes.
232 A. Well, we shipped those cattle to Kansas City——
By the COURT: How many does he say of those beef cattle?
A. They were shipped November 19, 1899.
Q. What was the date?
A. They were shipped November 19, 1899.
Q. Now, refresh your memory, was it October the third or November the third?
A. It was October the third. I was there a month before we got the cattle together.
Q. Oh, I see. So this shipment was made on the nineteenth of November of the beef cattle?
By the COURT: What is the date of that contract?
By ERSKINE SNODDY: Novemoer 22, '99.
Q. Now, Mr. Bryson, did you go to Kansas City then with Mr. Edmisson?
A. I went down with that first shipment, yes sir.
Q. That shipment was made November, '99?
A. Yes sir.
Q. Prior to the time this contract was made?
A. Yes sir.
Q. Well, was the contract made then while you were in Kansas City?
A. The contract for the delivery of the rest of the cattle?
Q. Yes sir.
A. Yes sir.
Q. You remember about what date that was?
A. Well, it must have been along two or three days after the nineteenth. Twenty-third or fourth, somewhere along there, after we got to Kansas City.
By the COURT: Now, you have gone into this testimony, I would

like to ask why it is necessary. I do not think either side ought to go into it. I do not see what figure this cuts.

233 By Mr. YOUNG: Your Honor, we insist on this proposition. The fact of the business is there was about sixteen or seventeen hundred head of cattle left on this range at that time, and these parties went to Kansas City and made this agreement, following right on the heels of this delivery. That certainly has a tendency to show——

By the COURT: But how does this testimony ten- to prove that fact?

By Mr. YOUNG: Why, it shows the number of cattle. It shows that he had the cattle, less seven hundred and ninety six taken from that number, which leaves between sixteen and seventeen hundred head on the range on the nineteenth of November.

By Mr. SNODDY: Well, he doesn't claim he got all the cattle.

By the COURT: That is a mere speculation, and that is what the Court is trying to avoid. It does not follow——

By Mr. YOUNG: That was the time we claim the count of these cattle were had.

By the COURT: How?

By Mr. YOUNG: That is the time we claim the count of these cattle was had.

By the COURT: Oh, no, this is entirely before this contract and does not amount to much more than a conclusion in this case.

By Mr. SNODDY: It don't show the number of cattle he got; it doesn't pretend that he got all the cattle.

By Mr. YOUNG: Your Honor, right after this was done they went to Kansas City and made this agreement.

By the COURT: Yes sir.

By Mr. YOUNG: Both the parties, he representing the commission company on the range and Mr. Edmisson representing himself, and they represented to the commission company how many cattle they could deliver.

234 By Mr. SNODDY: There is no charges of any misrepresentation.

By Mr. YOUNG: I am not saying there was any misrepresentation, I am saying representations were made and honestly made to this commission company, and consequently this agreement made on the twenty second was made, with both of these parties there at the time stating about how many cattle could be gathered. That goes to show how many cattle there were. Now, they have been permitted to show here, the plaintiff has, that there were cattle scattered around in these different ranches. We want to rebut that proposition by showing all the cattle he had at that time was rounded up and there was this total number, this number that Mr. Edmisson says himself he had, by shipping out prior to this contract seven hundred and some odd, and that left a number of cattle there, and they were to remain there to carry out this contract, as I will be able to show by this witness. He come back down there to get them and he got fifteen hundred and fifty six. That is the connection with that proposition.

By Mr. SWINDALL: I don't think that is the facts in the case, and I don't think that testimony is relevant to any issue in the case. His testimony shows they worked about nine or ten days rounding up this bunch.

By Mr. YOUNG: After the cattle had been scattered.

By the COURT: He came back here and went to work with these cattle and knows how many cattle were counted out. That testimony is perfectly competent. I do not see how the jury can draw any conclusion, or figure out the number of cattle from this testimony.

By Mr. YOUNG: Your Honor, I am going to follow this up and show how many cattle were received.

By the COURT: That part of it is all right; that is perfectly competent.

235 By Mr. MARUM: We would ask to have withdrawn from the jury——

By the COURT: Oh, no, the Court has raised this objection, but I have not raised it for the purpose of striking it out. I will not allow my objection to go to striking out the testimony.

By Mr. SWINDALL: You will remember that Mr. Young said if he didn't connect it, it was incompetent.

By Mr. SNODDY: In order to make it plain, we asked if he was speaking about October.

By the COURT: The Court raised the proposition, gentlemen, and counsel stated it was intended to get at the number of cattle. The talk was back and forth between Mr. Young and myself, and I made the remark if this was calculated to throw light upon the number of cattle, then it would be competent. There was no objection to it.

By Mr. YOUNG: That was my object, to get at the number of cattle there was. Of course, if there wasn't two thousand head of cattle there, it has certainly a bearing on this issue here, if they wasn't there at that time, and haven't been shown to be there since, why, certainly we could not be charged with getting them, when they have never shown they delivered these cattle. They have shown indirectly the cattle were on the premises, or undertaken to.

By Mr. SNODDY: I might misunderstand the testimony, but I don't understand this witness testifies he got all the cattle of Mr. Edmisson's at that time. Said they didn't range the west part at all.

By Mr. YOUNG: May we proceed, your Honor?

By the COURT: You may proceed along the line the Court has indicated, gentlemen. I do not see anything in this to help the jury out. Just wait a moment until I make a figure or two here, so I can see that I am right. Proceed, now, we will see what there is.

Q. Now, after you came back to Kansas City, after the contract was made, you were sent back by the company to receive these cattle, were you not?

236 A. To receive what remained on the range, what I left there, yes sir.

Q. Well, where did you leave these cattle, now, when you went to Kansas City, where were they?

A. Where were these cattle when I got back to Mr. Edmisson's ranch?

Q. When you went to Kansas City?

A. I left them in Edmisson's pasture, the pasture I described to the jury some time ago.

Q. Where did you find these cattle when you returned to receive them?

A. I found them all over the country; found them in all the pastures in the country, east, southeast and southwest and south.

Q. What period of time elapsed between the time that this contract was made, now, and you returned to Mr. Edmisson's?

A. The time the contract was made in Kansas City?

Q. Yes, and you returned to Mr. Edmisson's ranch?

A. About four days.

Q. About four days?

A. Yes sir.

Q. Did you go back with Mr. Edmisson that night?

A. No sir.

Q. How long was it before you got back to Edmisson's ranch?

A. I remained in Kansas City one day longer than he did.

Q. And then you came back and you say you found the cattle were scattered. Then what did you do?

A. Well, I found the cattle were scattered——

Q. Yes sir.

A. And I hired men and rounded them up again.

Q. He didn't round them up for you?

A. No sir.

Q. Well, when you returned and rounded up these cattle *up* again, where were they counted if counted at all?

237 A. They were counted in the stockyards at Curtis.

Q. Was there any other count made of these cattle to your knowledge?

A. No sir.

Q. There has been something said here about these cattle being counted through a gate that goes from Mr. Edmisson's pasture into Mr. Harrington's pasture. Do you know anything about any such count being made?

A. Never was any count made there. The cattle were put through that gate, but they were never counted.

Q. Then the cattle were first counted at where, you say?

A. They were counted at Curtis, at the stockyards.

Q. How many head were counted?

A. Fifteen hundred and fifty six, cows and calves.

Q. Was Mr. Edmisson there when they were counted?

A. Yes sir.

By the COURT: Fifteen hundred and fifty six?

By Mr. YOUNG: Yes sir.

A. He was there when the first train load was counted.

Q. What became of him then?

A. He followed that train load to Kansas City.

Q. Who was present, if anybody, representing him, to count the second train?

A. He left Mr. Black to do his counting when he left, before leaving.

Q. At Curtis?

A. Yes sir.

Q. Did Mr. Black assist you in counting these cattle at Curtis?

A. No sir, I never saw him any more. He went off and went to bed, and I never saw him again.

238 Q. You tallied the cattle up yourself?

A. I did, with the assistance of others.

Q. How did you do that?

A. Well, the deputy sheriff from Woodward came down there and attached seventeen head of these cattle for taxes, and we put them out to one side in a pen, and I was short of men, I had to stay at the shute and do the counting and he and another man would count them to another pen and as soon as we got in a car load lot, I would count them from there to the cars, and in that way we got a tally. We were pretty near the same.

Q. Got a total tally?

A. Yes sir, pretty near together on them; very little difference.

Q. Was this seventeen head that were taken out—was there fifteen hundred and fifty six besides the seventeen head?

A. No sir, they were taken out of the fifteen hundred and fifty six. I only shipped from Curtis fifteen hundred and thirty nine; but the count showed I had put into that stockyards fifteen hundred and fifty six, but I didn't ship but fifteen hundred and thirty nine. The sheriff took seventeen head of them.

Q. At Curtis?

A. They were left there at the yards.

Q. Then you went on to Kansas City?

A. Yes sir, I took those cattle to Kansas City.

Q. You don't know what became of the seventeen afterwards?

A. Yes sir, I do.

Q. What became of them?

A. The sheriff took them to Woodward, and I went up and paid the taxes on them and turned them over to Mr. Gober.

Q. Do you remember the amount you paid?

A. The amount of taxes?

By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.

239 By the COURT: You sold the cattle here and I suppose if there were taxes on them I suppose that would have to come out.

A. One hundred and thirty three dollars and sixty six cents.

By the COURT: What time was that?

A. That was in November.

By Mr. SWINDALL: Along in November.

By the COURT: Objection will be overruled.

By Mr. SWINDALL: The plaintiff excepts.

Q. So then you went on to Kansas City with the second train, did you? Did you see Mr. Edmisson after you got to Kansas City?

A. Yes sir, I saw him in Kansas City.

Q. How long did he remain in Kansas City, do you know?

A. I couldn't say, I couldn't say how many days he was there.

Q. Did you hear any conversation between him and the members of the company after you got to Kansas City?

A. Between he and Major Drumm?

Q. Yes, or Mr. Lampe?

A. I can't recall any conversation that took place between Mr. Edmisson and Mr. Drumm in Kansas City on the last trip I made down there; that is, when I made the final shipment.

Q. Well, now, did you get to Kansas City with all the cattle you started with?

A. No sir.

Q. Was there any——

A. There was two car loads taken here at Alva for taxes by the sheriff of this county.

Q. What became of them?

A. They were afterwards forwarded to Kansas City.

Q. Did you pay the taxes on them?

A. No sir, the taxes was paid by the railroad company through the Drumm-Flato Commission Company.

240 Q. You don't know the amount it was?

A. No sir, I don't know the amount.

Q. You were not at the premises any more then after that?

A. No sir, I wasn't at Mr. Edmisson's place any more.

Q. Well, did you take all the cattle you could find?

A. Everything we could find, everything that could be rounded up, yes sir.

Q. Did Mr. Edmisson say anything about the number as to what it was?

A. About the number?

Q. Yes, did he think he had gathered all of his cattle when he delivered them over to you at the time you made this shipment?

A. Was he with me all the time?

Q. No, did he say anything about that being all of his cattle at the time he made this shipment?

A. Why, no sir, he said he ought to have some more cattle, a few around, there ought to be some more. Seemed he didn't know where he ought to get them, they were not in a position where they could get hold of them.

Q. Did Mr. Edmisson tender you any other cattle than the ones you shipped from Curtis?

A. Did he tender me any?

Q. Yes.

A. He spoke to me at Curtis about nine or ten head they got in the pasture west of the Maxwell ranch; I can't recall the name of this pasture. They all have their particular names, or peculiar names; I can't recall the name of it.

Q. He spoke to you about having nine or ten head?

A. He spoke to me about having nine or ten head. I asked him why he didn't bring them on to Curtis, and he says he couldn't do it very well, and I says "I can't hold these cattle very well,
241 these cattle are thin, they have got to be loaded on that train and go to market." The cattle were particularly thin and in a position then where we couldn't water them, and there was no feed for them. So we had started to the station for the express purpose of shipping these cattle, and getting rid of them.

Q. About what time of the day was it these cattle were driven from Edmisson's pasture into the Harrington pasture?

A. It was after dark when I got the rear cattle in, the rear of them. The leaders started in may be about sun down, may be a little after sun down.

Q. Were you—where had you held those cattle, if you had held them at all, during the afternoon?

A. Held them in the afternoon? Where did we hold them?

Q. Yes.

A. You mean, before they went into that pasture?

Q. Yes.

A. Why, they were under round up, that is, they were working them, they worked them all day until four o'clock in the afternoon, four or five o'clock in the afternoon, and I asked these men that were working there to suspend work and allow me to move the cattle down on the water and water them and graze them a little. I had to hold them that night. I says after tomorrow morning I am going to put them in this pasture over here and tomorrow morning you can round them up, to defer working them. I suggested the idea to them it would be necessary for me to water them. There was fifteen or twenty men working at them all day long, and I moved them down on this little canyon or draw that there is there, small place for water, and held them there and watered them the best I could that evening before I put them into this Harrington pasture. I didn't get the rear of the cattle off that creek I guess it was half or three
242 quarters of a mile up to the gate, and I didn't get the rear of the cattle watered over there until near dark. I was left behind on that little creek with those rear cattle, until I could get them up to the gate.

Q. Did you notice anybody at them when you got there?

A. Well, when I got there with the rear cattle, there was five or six men there; Mr. Edmisson, I think was there, and these three men I had employed and may be one of his men.

Q. Did you round up the next morning?

A. Yes sir, I rounded the cattle up the next morning.

Q. Well, was there any of these fellows there——

A. Mr. Maxwell's man, Maxwell and Morris's worked until about eleven o'clock, and I rounded up the cattle in the three different pastures. Worked as rapidly as we could.

Q. Did they take any cattle out?

A. Yes sir.

Q. About how many?

A. Two hundred head, I should judge, may be a hundred and fifty, I couldn't say exactly what number.

Q. Now, this was done after they went through the gate?

A. Yes sir.

Q. Did you clean the herd up entirely clean there before you started to Curtis?

A. That was the final work on them. I requested these men to get all their cattle out, I didn't want to ship any except what belonged to Mr. Edmisson. That is what I requested them to get, their cattle out of there.

Q. You drove these cattle to Curtis?

A. Not that night. I remained in that same pasture that night.

Q. When was it you got to Curtis?

A. Well, I got to Curtis the next day. I got to the little school section or pasture about half a mile south of Curtis, or east
243 it is, I believe, along in the afternoon, late in the afternoon, put them in there, and then we worked the strays out again, handled them to see if we could find any, and penned them at the stock yards just before we were going to ship them.

Q. What time did you go to ship them?

A. One train along in the afternoon, and the other one didn't get out until after midnight, well, it was after day light when I passed here, along eight or nine o'clock; eight or nine o'clock, I can't recollect just exactly what time it was we did get them loaded there at Curtis, but I know it was along towards day light.

Q. You never then had anything more to do with this matter, did you?

A. No sir.

By Mr. YOUNG: Take the witness.

Cross-examination by CHAS. SWINDALL:

Q. Mr. Bryson, who went with you to Kansas City with these cattle?

A. How is that?

Q. Who went with you to Kansas City with these cattle?

A. Went with me on that train?

Q. Yes sir.

A. I don't think there was anyone, I can't recall whether anyone went along with me or not, right now.

Q. Do you know who was employed by you at that round up as cook?

A. Yes.

Q. Who was it?

A. Tom Govier.

Q. Now, do you know it is a fact that Tom Govier went on to Kansas City with you on this train of cattle?

A. Well, he might have been along there; I know he went to Kansas City, I don't remember whether he went on that train or not. I know he was down there, that he went, but I don't recollect that he went with that train.

244 Q. He was there at Kansas City at the time these cattle, first cattle, were shipped under this contract?

A. Govier?

Q. Yes sir.

A. The first cattle?

Q. The first ones under this contract?

A. Oh, if he was he went with Edmisson, when the first ones got down.

Q. I don't mean the first car load, but the time you were there in Kansas City?

A. Yes, he went down and another young fellow went down, too, and I think perhaps he was on this same train with me.

Q. You say there wasn't any count of these cattle at the gate the evening they were turned back?

A. Did you ask me if they were counted?

Q. Yes.

A. No sir, they wasn't counted at the gate there at all.

Q. Now, wasn't you standing at the gate, you and Dock Black and Edmisson, and counted these cattle?

A. No sir, I could not have been and off watering the cattle, too.

Q. You wasn't up there when the cattle was counted through?

A. No sir, not when the first cattle went through.

Q. Not when the first cattle went through.

A. No sir, no sir.

Q. Where did you go after you turned these cattle into the Harrington pasture?

A. I stayed there until I expect it was eight or nine o'clock before I got out of that pasture. I stayed there holding those cattle until the boys got their suppers and come back there to herd these cattle that night.

245 Q. Now, don't you know after these cattle were put over in the Harrington pasture that you and Edmisson and Holman and Black and a number of these parties went down to the wagon there where Tom Govier was cooking and this count was talked over there before Mr. Govier and you never made any objection to the count as made there through that gate?

A. No sir, there is no truth in that at all.

Q. You didn't talk about this count before Tom Govier at the wagon?

A. No sir, for the fact is I didn't go back to the wagon, I went to his house.

Q. Well, to where Tom Govier was cooking, where you and the people with you eat at that time? Didn't you go down with these parties and this count was generally talked over at the wagon where you were present?

A. There was no one with me when I went down to the house except one man; we stayed out there and held those cattle until two of the boys got their supper and come out there to relieve us, and to hold the cattle on the first guard, and we went in, it is kind of a rough way to get down to Mr. Edmisson's house, one or two canyons, and I remember very distinctly I got lost and it was dark, but the

horse straightened me out, I gave him the reins and he took me to the house. It was dark when I found out I had got down on the wrong road, gone down the wrong canyon, and he wanted to go up over, which he did, and took me to the house all right.

Q. The next day after these cattle were counted through that gate and while you were taking them down to Curtis, don't you know this count was talked over in the presence of Ely Roberts?

A. No sir, you know I have no object on earth in saying those cattle were not counted, but it is the truth, they were never counted through that gate.

Q. Then the statement of Mr. Roberts that he made that
246 he saw you at the gate and these cattle were counted through the gate is not true?

A. No sir, not a word of truth in it.

By the COURT: It is not the province of one witness to pass on the truth of the statements of another. Let them make their statements and the jury will say. That is bad practice always. Proceed.

Q. Did you have any conversation there at Curtis after you got there with these cattle with Mr. Edmisson in the presence of Dock Black, in which Mr. Edmisson requested you to go back and cut out enough of the cattle he had rounded up there to make out your nineteen hundred, and you told him you couldn't do it, because the cattle was thin and poor and you wanted to get on the market with them?

A. The conversation we had was the statement I made awhile ago here. I asked him if he had found anything over on that round up and he said he had got nine or ten head, something to that effect.

Q. I will ask you if he didn't state to you in the presence of E. F. Black that he had enough cattle rounded up at his place to make out this nineteen hundred head, and ask you to go back and get them?

A. He never made no such statement to me in the presence of any one.

Q. Now, I will ask you if it is not a fact that after you got to Kansas City and there at the stock yards at Kansas City that Mr. Edmisson didn't request you to come back and come down home with him then and get a sufficient number of cattle to make out this number and this conversation took place in the presence of Tom Govier?

A. No sir.

Q. He never requested you to go back with him?

A. No sir, he never requested me to go back to the ranch.

Q. After you were at Kansas City?

A. No sir.

Q. There was nothing said about your going back?

A. By Mr. Edmisson?

Q. Yes sir.

247 A. He never asked me whether I was going back or to go back or anything about it.

Q. Now, didn't you tell Mr. Edmisson you couldn't go out that night on account you had some business on but may be you would get down the next night and for him to send a boy to the station, that you would ride out?

A. No sir.

Q. You didn't have any such conversation with Mr. Edmisson at Kansas City in the presence of Tom Govier?

A. No sir, not in the presence of Tom Govier or anybody else.

By the COURT: Gentlemen of the Jury: It is adjourning time, and we will now continue this case until tomorrow morning at nine o'clock. During the adjournment you will remember the admonitions the Court has heretofore given you. You will not talk with anyone about this case nor allow anyone to talk to you nor talk among yourselves nor form nor express an opinion in the case until it is finally submitted to you. You must remember this admonition. Do not forget it. Do not talk about this case to anybody, not even among yourselves. Not only are you to refrain from talking about this case, but you are not to stand and listen to any one talk about the case. If anyone should undertake to talk to you, you should tell them you are a juror in this case, and if it is persisted in, if they persist in talking about the case, turn around and walk away from them and bring them into court. This admonition is necessary because any conduct of that kind would result in a new trial, and of course the entire work on this case would be abortive. It has already been tried and sent back from the Supreme Court and the Court wants to try it this time so it will not be reversed and I suppose counsel on both sides want the same thing.

A. Through with me Judge?

248 By the COURT: Yes sir. Adjourn court, Mr. Crier.

Here Court adjourned until nine o'clock A. M. April 29, 1904, at which time the trial of the above cause was resumed.

Jury all present. Counsel for plaintiff and defendant present.

By the COURT: Jury is all present, gentlemen. Proceed.

J. F. BRYSON.

J. F. BRYSON, recalled as a witness on behalf of the defendant, for further cross examination, testified as follows:

Cross Examination by CHAS. SWINDALL:

Q. Now Mr. Bryson, I believe you stated yesterday on your direct examination that you commenced gathering these cattle on the third of October?

A. Yes sir, but I made a mistake. I refer to my book here, and see where I made the error, called my attention to it. I remember it now. It was the thirtieth day of October I started in; instead of being in October as I stated, it was the third day of November that I went out there.

Q. It was the third day of November?

A. The third day of November that I went to Mr. Edmisson's ranch.

Q. And that was the mistake, that you commenced the third of October?

A. Yes sir, that was a mistake, because there is the date where I started in. On October thirtieth I went to Woodward, on October 30th, and I had to remain there until I got a letter from the house. Instead of October 3rd, it was November the third I went down there.

Q. You had that book yesterday evening?

A. Yes sir.

Q. How is it you happened to make this mistake with this book in your possession to look at?

A. As I stated to you, there was October 30th, and I just referred to it and I took that for October 3rd.

249 Q. You thought October third followed October 30th, did you?

A. Yes sir, I thought it was October third instead of October 30th.

Q. Then when you stated you had been working with these cattle over a month that was a mistake also, was it?

A. Well, I was down there over a month. It was not a mistake.

Q. I am talking about what you were there when you gathered this first bunch of cattle that you said you worked over a month rounding up this first bunch of cattle?

A. I meant to say I was there over a month, that I was there.

Q. You said you commenced there the third of October and worked until the nineteenth of October when you shipped the first bunch of cattle.

A. I know I did but that—after I referred to the book there and saw the dates I saw where I was mistaken.

Q. So you are going by your books and not your personal knowledge of this subject?

A. Well, it was an error about being the third of October, yes sir.

Q. I say you are going by your book and not by your personal knowledge as to the matters you have been talking about in this case?

A. I go by my personal knowledge of the work I did down there.

Q. Then you did the work there from the third of October to the nineteenth of November?

A. It was the third of November.

Q. Then you were there from the third of November to the nineteenth, making about fourteen days, sixteen days instead of over a month?

A. Well, I was there until the seventh of December.

Q. I am talking about your first trip.

A. Yes, that is right, it was from the third of November until the nineteenth of November that I made the first shipment, that we got the first cattle together.

250 Q. Now you talked yesterday about making a general round up of these pastures on the first trip. Did you go all over that pasture yourself?

A. I was all over it as far as being in it.

Q. The Edmisson pasture and the other pastures you stated had been worked at that time?

A. I was over the Edmisson pasture.

Q. Was you over the Chapman pasture?

A. I don't think I was all over it, no sir.

Q. So you didn't make a general round up, as you stated yesterday?

A. I made a general round up with Mr. Morris and Maxwell's men, they would throw them together from one way and we from the other.

Q. You were just relying on what Maxwell and Morris did and didn't go down there to see what was brought in, did you?

A. There was one little pasture in the pasture, I didn't go in it at all.

Q. You didn't go into the north pasture or the northwest pasture, did you?

A. As you said, I didn't make——

By the COURT: Answer the question.

Q. I am not talking about what you understand, I asked you if you worked this north pasture and if you worked this west pasture?

A. There is no north pasture I have any knowledge of.

Q. There is a northwest pasture and a west pasture?

A. There is no northwest pasture I have any knowledge of.

Q. If there was a pasture over on the north and west that Mr. Tolbert spoke of, you have no knowledge of that pasture then?

A. There is no northwest pasture belong- to Mr. Edmisson, and never was down there.

Q. I am talking about belonging to Maxwell and Morris?

251 A. No sir, they had no northwest pasture; that is, northwest of Edmisson's place; they might have had a pasture northwest from their place.

Q. You just went there in the Edmisson pastures?

A. No sir, all through the pastures, east and south and southwest.

Q. But not through the north and northwest?

A. Northwest would have throwed me in Quinlan's pasture.

Q. You heard the pasture that Mr. Tolbert talked about over on the north and west of where he saw these cattle, didn't you?

A. I never heard Mr. Tolbert's evidence.

Q. You are acquainted with Mr. A. W. Tolbert, are you not?

A. I know the man by sight, yes sir.

Q. What did you ship these cattle, these cattle you shipped under the contract, these fifteen hundred and fifty-six that you claim, what date did you ship them?

A. Shipped to Kansas City on December seventh. Loaded at Curtis. Loaded at Curtis.

Q. Loaded at Curtis?

A. Yes sir.

Q. Now, what time in the evening did you commence loading those cattle?

A. The first train was loaded early in the evening. They were taken out that night some time after night. Commenced along in the evening late.

Q. That was the first train load?

A. That was the first train load, yes sir.

Q. How many cars were in that train load?

A. There was some—in the neighborhood of twenty, may be twenty one or two.

Q. How many cattle did you put in a car?

A. Well, they were loaded all the way from thirty to thirty eight head.

252 Q. Does that book show how many you put in each car?

A. No sir.

Q. How did you keep that tally there?

A. I had a tally list; I didn't keep that, I kept the total number.

Q. You kept the total number but you didn't keep your tally list?

A. No sir, I had no way of keeping that.

Q. You don't know how many cattle went in each car?

A. I know how many cattle I counted.

Q. I am asking—I am not asking how many you counted, I am asking if you know how many cattle were loaded in each car?

A. Averaged thirty to thirty eight head.

Q. And twenty two cars in that first train?

A. I said somewhere twenty to twenty two cars.

Q. How many in the last train?

A. About the same number, about twenty cars.

Q. Now, Mr. Bryson, you stated that this last train was loaded after Mr. Edmisson's departure, after Mr. Edmisson left?

A. Yes sir.

Q. What time did you commence loading them?

A. It was somewhere along about three or four o'clock in the morning.

Q. Three or four o'clock in the morning?

A. Yes sir.

Q. What time was it that the deputy sheriff got up from Woodward to get this seventeen head of cattle?

A. About nine or ten o'clock that night. Eight or nine o'clock along there somewhere.

Q. You didn't commence loading this other car until about four o'clock in the morning?

A. Four or five o'clock somewhere along there.

Q. And he stayed there with you and wanted to help count

253 these cattle in the separate stock pens and you counted them into the shutes?

A. He was there when I left.

—. He was helping you count these cattle?

A. He worked there.

Q. He worked there?

A. Helped run these cattle in the small pens.

Q. You paid him anything?

A. No sir.

Q. What deputy sheriff was that, Mr. Bryson?

A. Young man by the name of Smith, son of the man known as Judge Smith, in Woodward.

Q. B. B. Smith's son?

A. Yes sir.

Q. And he volunteered to help you run the cattle in the pens?

A. Stayed there until all these cattle were shipped out, loaded and gone; was there when I left.

Q. Now, who helped you count these cattle into the car from the cattle shute?

A. I don't know that there was anyone helped me at all. I did the counting there at the shute myself.

Q. Who else was helping through the cattle into the pens besides Mr. Smith?

A. Well, I had two men there. I had one man and the railroad company had some men there. They were all assisting.

Q. What men did you have?

A. This man Holman was there.

Q. Millard Holman?

A. Yes sir.

Q. The young man we took his deposition here?

A. I presume it was. It was a young man used to work for me.

Q. You employed him?

254 A. Yes sir.

Q. And you employed E. F. Black to help you, too didn't you?

A. Yes sir.

Q. Now, Mr. Bryson, I will ask you if it is not a fact that on the evening of the seventh of December, 1899, after you had driven these cattle to the town of Curtis and you were crossing the railroad track to take them into the north shute at the shipping pens at the town of Curtis, if you didn't meet Mr. Tolbert there, one of the line men for Smith-Maxwell-Morris, and he wanted to know what you had, what cattle you had, and you told him you had the Edmisson cattle, and he said he wanted to work your herd and cut out strays and you told him there at that time and at that place that these cattle had been worked and the strays cut out the evening before and the cattle counted through the gate into the Harrington pasture?

A. No sir.

Q. You are certain you didn't tell him that on the seventh of September?

A. I might have told him a few were worked out——

Q. You are certain you never told Mr. Tolbert these cattle were cut out—the strays were cut out and the cattle were counted through the Harrington gate?

A. I will state I might have told him about the strays but I will take my oath and double oath these cattle were never counted through the gate.

Q. Now, you stated yesterday evening Mr. Bryson that you went down to Mr. Edmisson's house and got your supper about eight o'clock at night, in the evening, the evening that these cattle were

counted through the gate. Now, don't you know you counted the cattle through the gate and you went down to Edmisson's house and this count was talked over by the boys in the presence of Tom Govier, your own cook and this count was talked of in your presence?

255 A. No sir, never.

Q. You didn't go down and get supper before sun down that evening?

A. No sir, I couldn't have done that, it was after dark when I got the cattle in the pasture.

Q. You are positive of that.

A. I know it. And I didn't get down there, as I stated before, last evening, I didn't get down there until late, until these boys come back, got their suppers and come back to take the first guard.

Q. You ate dinner down there at Mr. Edmisson's house that day, didn't you, the day these cattle were put through that gate?

A. We ate dinner the day we were working the cattle——

Q. The day the cattle were put through the gate?

A. Yes, the noon of the day before.

By Mr. SWINDALL: Just read the answer.

Last preceding answer read by the stenographer.

Q. Now, Mr. Bryson, you remember testifying in the case of Drumm-Flato Commission Company *versus* R. C. Edmisson, at Liberty, Missouri, along in March, don't you?

A. Yes sir.

Q. Now, don't you remember swearing there, Mr. Bryson, that you never worked the west part of this pasture and the north part of the pasture at all?

A. I never worked in there myself, no sir. This pasture you have reference to is the only pasture I can get in my mind which would be a little to the northwest from Chapman and Morris's ranch, but not northwest from Mr. Edmisson's.

Q. I am not talking about northwest from Mr. Edmisson's ranch, but what they call the northwest pasture?

A. That is the pasture over north and west, but there is no northwest pasture, or what would be called a northwest pasture. There is one known as the Mosby pasture that I helped work, which lays almost——

256 Q. I will ask you if you didn't swear at Liberty, Missouri, if you didn't swear you didn't work this pasture that is known there by all these people as the north or northwest pasture?

A. Now, will you please explain; give me a little idea of this pasture. There is that pasture that runs northwest from Chapman's ranch, which is due west from Edmisson's ranch.

By the COURT: If you have this testimony, read it to him.

A. There is a pasture laying right west of that I helped work, what they might call the northwest pasture of the Chapman pasture, that I didn't work.

Q. Now, Mr. Bryson, you stated yesterday evening that when you rounded up these cattle there before this contract was made, at the

time you cut out some fat stuff there that you throwed back, two hundred and fourteen head of cattle, in the Mosby pasture?

A. Throwed back in what pasture?

Q. Wasn't it the Mosby pasture?

A. No sir, right back in the north side of the Edmisson pasture.

Q. Was there any fence between them?

A. No sir.

Q. Now, you stated yesterday evening that somebody throwed the cattle this two hundred and fourteen head back with these twenty-five hundred and seventy eight. Did you see anybody doing that?

A. No sir, but I saw the cattle in there the next morning.

Q. Then you don't know that anybody did it?

A. Well, it would be useless for me to state here that I know it; they did it, but I didn't see them.

Q. You didn't see them?

A. They did it, but they didn't own to it.

Q. Who didn't own up to it?

A. Mr. Mosby and his help.

257 Q. Now, Mr. Edmisson, wasn't there at that time, was he?

A. Wasn't where?

Q. At the time you rounded up this pasture, at the time you cut out these two hundred and fourteen head of cattle?

A. He was there at the time we made that tally, as well as I remember, he was there.

Q. Don't you remember Mr. Edmisson didn't get home until the night after these cattle were rounded up there?

A. After the big bunch?

Q. Yes sir.

A. The big bunch that was rounded up in his pasture?

Q. Yes sir.

A. The little bunch, this two hundred and fourteen head, and about a hundred and sixty nine head of fat cattle, you mean?

Q. Don't you know he wasn't there when those cattle were cut out and throwed back into the pasture?

A. No sir, I don't know it. It seems to me very much like he was there and helped tally the cattle, count them. Mr. Mosby was there and ran the outfit.

Q. Now, when you told this jury yesterday evening in court that somebody run these cattle back again that was just what somebody told you?

A. No sir, I was going on my own judgment. I saw these cattle.

Q. Do you say you had to go back into the pasture where you threw this two hundred and fourteen head of cattle to see whether they were there or not?

A. No sir.

Q. I am asking if you didn't?

A. No sir, not that night.

Q. That is the first time you had ever seen this big bunch of cattle?

A. The first time?

Q. I am talking about this round, the first time you had
258 ever seen the Edmisson cattle?

A. Yes sir, about the first time.

Q. You mean to tell this court and jury you can identify two hundred and fourteen head of mixed range cattle when they drive them back into a herd of twenty five hundred other cattle?

A. No sir, I don't mean to tell the jury I can identify the two hundred and fourteen head, but I didn't have to identify them. I knew some of them, and I saw enough in there to satisfy me that a part of them were in there and that the rest of them were.

Q. You are swearing because you saw a part of them and you want to make this court and jury believe that the whole two hundred and fourteen head were turned back in there?

A. Well, they evidently did.

Q. What do you mean by evidently?

A. I mean I am satisfied that they were all in there.

Q. You told the court and jury yesterday evening they all did get back?

A. I think so yet.

Q. It is more think on your part than anything else, isn't it?

A. Well, I think so from what I saw.

Q. You never went back down to where these cattle were throwed, this two hundred and fourteen head of cattle, to see how many of them got back into this herd?

A. No sir, never went back down there at all.

Q. Who was helping you at that round up?

A. What round up was that?

Q. This round up where you cut out these twenty five hundred and seventy eight head of cattle and the two hundred and fourteen head of cattle?

A. Who was helping do all the work?

259 Q. Yes sir, who was helping you?

A. Men from all over the country, neighboring ranchmen, as I stated before, Mr. Edmisson had Mr. Mosby's men——

Q. Did you have Mr. Black and Mr. Holman working for you at that time?

A. No sir, not the first round up, I didn't have anybody employed at all.

Q. Did you ever speak to Mr. Edmisson about these two hundred and fourteen head of cattle being throwed back into that big herd?

A. I made the remark when the cattle were counted, I says, "There is so many cattle here" stating the number, "less what was in the herd before."

Q. I am asking you if you told Mr. Edmisson?

A. I don't know whether I did or not.

Q. If you claim they had been perpetrating this on you, how come you to go to Kansas City as representative for the Drumm-Flato Commission Company, on the 22nd of November, and have them to enter into a contract with Edmisson for him to deliver them nineteen hundred head of other cattle, after you had come out there to

gather that number of cattle, and only make one count on these cattle and that as you drove them into the shipping pens at Curtis?

A. I don't think the Drumm-Flato Commission Company made any contract with Edmisson until they made it after I went down there and reported what I had seen on the range.

Q. Did you tell them about running these cattle around and trying to count them twice?

A. Yes sir, I did. I reported as near as I could get at it the number that was there, and told them about what I could get, but I didn't get quite as many cattle as I thought I could get.

260 Q. Then you went down there and relied on your own count and didn't ask anybody else to help you count these cattle, and went and only took one count and that was the count you made as they went into the cars from the cattle shute at the town of Curtis, in that last shipment?

A. Yes sir.

Q. That is the only place you counted them?

A. That is the only place I could count them There wasn't any place to count them, I wasn't going to receive any cattle on the range, I wasn't to receive them on the range.

Q. You counted the first train load on the seventh of December, 1899?

A. The train load that Mr. Edmisson came down on?

Q. Yes sir.

A. Yes sir.

Q. Who counted it?

A. Mr. Black and I tallied them together.

Q. You and Mr. Black?

A. Yes sir.

Q. Now, you say you wasn't to count them on the range?

A. Wasn't what?

Q. You say you wasn't to receive these cattle on the range?

A. I say I didn't receive them on the range.

Q. You exercised ownership over these cattle at the time as the agent of Drumm-Flato Commission Company, at the time they passed through that gate?

A. I managed them to get them to the station.

Q. I say you exercised ownership over them——

A. I never exercised ownership over them, I exercised management in getting them to the station as best I could.

Q. Are you acquainted with Ely Roberts?

A. I knew a man by the name of Roberts; that is, I met a man by the name of Roberts at some cattle——

261 Q. Didn't you give him a calf out of this herd of cattle after you passed through?

A. No sir, I didn't give him any calf. I will explain if you wish.

Q. I am asking if you didn't give him a calf?

A. No sir, I left the calf with him to take care of, and if any one called on him for it to take it—if anyone called on him for it, all right, if not, keep the calf, the calf was crippled and poverty stricken, and he said he would take the calf and feed it, take care of it.

Q. You said a moment ago you didn't know Mr. Roberts?

A. I say I knew of Mr. Roberts, I had met him, I wasn't to say acquainted with him like I would be with another man.

Q. I will ask you, Mr. Bryson, if you didn't give Mr. Govier a cow to keep?

A. I gave him one on the same conditions. He suggested to me he would get the cow and bring her home, and I says "All right, Tom, you go and get that cow; she will never get anywhere; bring her back and feed her and if anyone calls on you for the cow you take pay for her."

Q. You had plenty of cows to give to your neighbors?

A. No sir, the cows were poverty stricken and would die.

Q. You didn't count those two cows in this herd that you count as received?

A. No sir.

Q. You didn't count the ones you gave away?

A. I didn't give any away.

Q. Well, the ones you left there?

A. No, I didn't count those; those were not counted; they were not in the yards.

Q. You just counted what got into the yards?

A. Yes sir.

Q. You did receive them sufficiently to give them away or
262 authorize how they should be cared for?

A. The cattle were laying there, couldn't move, and it was either let them lie there or be taken off.

Q. I say, you exercised sufficient charge of them to put them out with your neighbor*d*, cattle men there and people employed by you to keep, and still you didn't receive them?

A. Exercised judgment to have them taken care of if possible to do so.

Q. Why didn't you tell about this, about these two yesterday when you were talking about the number of cattle you got?

A. I was only talking about the number of cattle I put into the yards.

Q. Where is that tally list you made at that time, showing the number of cattle that were tallied there into the cars?

A. The number?

Q. The tally number of that count, showing the number tallied into the car?

A. I have got a tally number, I have got the total here.

By the COURT: He asked you where it is.

A. Got it in my book there.

Q. I am talking about where is that tally sheet you made at that time?

A. I don't know, I haven't got the tally sheet.

Q. Did you tally one car and then fasten it up?

A. I would just count the cattle into the car and put down the number and mark the number of the car and go ahead, go right along just as they loaded the cattle in the car.

Q. And still you didn't keep that sheet? You would rather put down the whole number?

A. I put down the whole number there at Curtis, yes sir.

263 Q. When did you put that number down in the book?

A. I put it down there at Curtis.

Q. What did you do with your tally sheet?

A. As I told you, I don't know what I did with it. I had no further use for it after I got the total number in there.

Q. Didn't you state yesterday you tallied these cattle in the book?

A. No sir, I didn't say anything about tallying them in the book. I said I tallied them as they went into the car. I might of tallied them in a small book, but I haven't it at this time. I might have tallied them on a sheet of paper.

Q. You don't know what you tallied them on?

A. I know I tallied them.

Q. That is about all you know, you tallied them and got sufficient to make up fifteen hundred and fifty-six, and you put it down on your book?

A. When I tallied them up I found I had fifteen hundred and fifty six cattle.

Q. How long had you been working for Drumm-Flato Commission Company at the time you went down there to get these cattle?

A. I commenced working for them prior to that time—well, right at the time I went down there.

Q. You had been working for them prior to that time?

A. No sir.

Q. Never had worked for them prior to that date?

A. Nothing more than to ship for them.

Q. Worked for them since that?

A. Yes sir.

Q. Been working for them since then?

A. Yes sir.

Q. Are you working for them now?

A. No sir.

264 Q. They are paying your salary, the salary you get, and your expenses?

A. They don't pay me my expenses for coming here.

Q. They pay you for coming here as a witness?

A. No sir.

Q. And also at Liberty, Missouri?

A. Well, they pay me at the rate of so much a month.

Q. Thirty three and a third dollars a day and your expenses?

A. Thirty three and a third dollars a day?

Q. Yes sir—at the rate of a hundred dollars a month? I mean, three and a third dollars a day, at the rate of a hundred dollars a month?

A. Yes sir.

Q. Now, Mr. Bryson, when you counted these cattle into the cars there at Curtis you never separated them at all, you just counted cows, calves, yearlings, everything just as it came up?

A. Yes sir.

Q. You mean to tell this court and jury you could stand there by the shute with cows and calves and yearlings, everything, running up the shute into the car and tell everything that went into the car?

A. I don't pretend to tell this court or tell this jury I could tell, I might have overlooked a calf once in a while, get down along side of a cow and slip in.

Q. This was at night?

A. Yes sir.

Q. Moonlight?

A. No sir, dark night. We had lanterns.

Q. You counted these cattle into the shute by means of lanterns?

A. Yes sir.

Q. Did these railroad men make a count too?

A. No sir, I don't think it is customary for them to make a count.

Q. Did you tell him you were trying to count the cattle?

A. It is always customary to count the cattle.

265 Q. Don't they count the cattle and separate them, put the cows in one car, two year olds in one car and calves in another?

A. Well, sometimes as a general thing they won't ship calves separate. They ship separate, too, but not where it is mixed cattle.

Q. These cattle were poor to go into the winter, and yet you put them all right into the car?

A. Yes sir.

Q. Did you go on to Kansas City with these cattle?

A. I went with the last train.

Q. Did you see any cattle in this Edmisson brand at the—already at Kansas City?

A. Any cattle in the brand?

Q. Yes sir.

A. I had three dead ones.

Q. Do you know how many died before that?

A. Mr. Brothers represented to me he lost four.

Q. Mr. Brothers? Did he come up on the family train, the one they all come on?

A. He went up on the family train, as you call it, I think.

Q. I thought Edmisson and Govier had charge of that train?

A. I sent Mr. Brothers with it to look after that, that Mr. Edmisson went up on.

Q. So Edmisson never did have any charge of the cattle?

A. I never knew Mr. Edmisson was going to Kansas City until just before the train started, never had spoke a word to me about going.

Q. Did you tell him what your count was at Curtis?

A. He had a man there and he got his man's count I suppose.

Q. How do you know he did?

A. I suppose he did. I don't remember whether I told him what count I had or not.

Q. You said Mr. Black went off and went to bed?

266 A. Yes sir.

Q. And you never did tell Mr. Edmisson how many cattle you had there?

A. I don't know that he ever asked me. He was there in Kansas City when they come in, to see.

Q. Now, you stated yesterday about the paying of these taxes down in Woodward County and the taxes up in Woods County. Wasn't it the agreement that these taxes were to be paid by the company?

A. I never heard of such an agreement.

Q. You never told Mr. Edmisson you would pay the taxes for the company?

A. I never said anything to Mr. Edmisson about it. Never knew anything about he was going to collect the taxes until he wired these people the cattle were there and to collect the taxes.

Q. Wired which people?

A. He wired the sheriff of this county and sheriff of Woodward County.

Q. How do you know he did?

A. I saw the message.

Q. Did you see the original messages in the telegraph office?

A. Yes sir.

Q. The original messages in the office?

A. Yes sir.

Q. You know he sent them?

A. No sir.

Q. Somebody else couldn't have sent them?

A. No sir, the operator told me, called my attention to them, and I recognized his hand writing on the messages.

Q. You remember that?

A. Yes sir, my attention was called to it.

Q. You can't remember anything about this tally book you had?

A. Well, I had to look after these taxes, I didn't want these cattle stopped if I could help it. I tried to pay these taxes by draft and couldn't do it.

267 Q. How come you to go and look at the original message?

A. I was stopping there and the operator called my attention to it, stopped there after the first train had gone away.

Q. You wasn't out there at the yards then to see how many cattle got away, to see if any got away from you, but you was down at the depot?

A. The depot is right close to the station, I mean the shute.

Q. You wasn't up there counting at that time?

A. We wasn't doing any counting until the cars were moved up to let them load them.

Q. How many men were with that herd from the time you left the Harrington pasture until you got to Curtis?

A. How many men did I have?

Q. How many men were with that herd of cattle?

A. Four men besides myself.

Q. Is that all?

A. That is all.

Q. I will ask you if you wasn't there and Mr. Oscar Brothers, if he wasn't there?

A. Oscar who?

Q. Oscar Brothers?
A. Yes sir, he was there.
Q. And E. F. Black?
A. Yes sir.
Q. And Millard Holman?
A. Yes sir.
Q. And Ely Roberts?
A. No sir.
Q. Mr. Roberts didn't go about six miles with that herd of cattle?
A. I don't know, but he didn't help me.

Q. I am asking you who went with that herd of cattle?
268 A. I don't remember of him being along with them at all. I think he come up a little after—he came there to us after we got the cattle in this pasture. I think——

Q. You stated you held these cattle in that pasture two nights?
A. Yes sir.
Q. I will ask you if it is not a fact you throwed them through this gate one evening and drove them down to this little half section pasture and drove them to Curtis the next night?
A. No, sir, the morning after the first night, where you say they were counted, we held them, I held them until about eleven o'clock for these people to work them, and I moved them over on to water, and moved them on, up on to the divide and scattered them out to graze and left them there until next morning. Next morning we gathered them up and moved them on to Curtis, then we put them into that little half section, whatever it was.
Q. You are positive of that, are you?
A. Oh, yes. Yes sir, I know it.
Q. Mr. Edmisson, the plaintiff in this case, had helped you round those cattle up, this last herd?
A. How is that?
Q. I say, Mr. R. C. Edmisson, the plaintiff here, had helped you round these cattle here? The last herd?
A. Yes sir.
Q. He did?
A. You mean on the general work?
A. Yes.
A. No sir, he was out but very little. Had a man there.
Q. He had a man there, did he?
A. Yes sir, had a man by the name of Guthrie, I believe.

Q. And you all stayed there at his place?
269 A. Well, we had a wagon along with us when we were on the range.
Q. And when you wasn't you stopped at his house?
A. Yes sir.
Q. Did he ever make any objection to your gathering these cattle?
A. Mr. Edmisson?
Q. Yes sir.
A. No sir, not that I remember of.
Q. He took you out and showed them to you?
A. No sir, not the last time, never went out with me the last time. He showed up after we got them into the pasture.

Q. Are you acquainted with a gentleman by the name of Popham?
A. I met the gentleman.
Q. He was down here looking after these cattle before you went down there?
A. I couldn't say whether he was or not.
Q. He is an employee of the Drumm-Flato Commission Company?
A. Yes sir.
Q. Mr. Edmisson was there with these cattle at Curtis and went on to Kansas City with a part of them?
A. The last shipment?
Q. Yes sir.
A. Yes sir.
Q. And still you say that he didn't deliver them to you?
A. Well, I can't tell anything about that, I don't know about any delivering at all.
Q. He had a man who helped you gather them?
A. No sir, he didn't in on the range.
Q. Otis Guthrie helped you?
A. Yes sir.
Q. Edmisson furnished the horses?
A. Yes sir, he furnished the horses for me to ride and these men, this man Guthrie to ride. I furnished the feed.
270 Q. And he furnished the horses?
A. Yes sir.

By Mr. SWINDALL: That is all.
By Mr. YOUNG: Wait a minute, Mr. Bryson.

Redirect examination by O. G. YOUNG:

Q. Mr. Bryson, do you remember what amount of expense you paid in rounding up these cattle after the twenty second of November, after this contract was made?

By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.
By the COURT: This is the first bunch of cattle?
By Mr. YOUNG: No sir, the bunch after the twenty second, after the contract was made. I would like to be heard, if your Honor please.
By the COURT: I will hear you.
By Mr. NOAH: I would like to present this matter to the Court, on this proposition. I would like to call the Court's attention to the words——
By the COURT: Your pleadings here claim under the mortgage.
By Mr. SWINDALL: They don't ask a claim of this kind at all.
By the COURT: You don't claim under any contract?
By Mr. NOAH: If the court please, this is trover.
By the COURT: You ask for a foreclosure of your mortgage. You cannot shift here to any proposition your pleadings do not cover.
By Mr. NOAH: No sir.

By Mr. SWINDALL: They don't file any cross petition for damages for gathering these cattle at all.

By Mr. NOAH: We contend that is not necessary, that is their case, they bring it.

271 By Mr. SNODDY: Yes sir, we bring our claim for damages here, and there is no claim of that kind set up at all. They repudiate the whole contract in their pleadings.

By the COURT: This answer is drawn under the double theory, as I take it, first, that the contract made in November was void for want of consideration; second, that the cattle never were delivered under that contract, and that all the cattle that were received were received under the mortgage; that all the cattle received by defendant, including the cattle mentioned and in respect of which the complaint is made by plaintiff's petition here, were received by defendant under and by virtue of said chattel mortgage and were a part of the cattle embraced in and described in said chattel mortgage, and that said defendants then were entitled to receive all of said cattle, including the cattle mentioned and described in the plaintiff's petition, under and by virtue of the terms of said mortgage. It is further plead that the cattle mentioned in and referred to in the agreement signed by plaintiff and said Drumm-Flato Commission Company and dated the twenty-second day of November, 1899, of which a copy is filed with the plaintiff's petition here, marked "Exhibit A," are a part of the cattle described in said chattel mortgage, which the said defendant already had title to by virtue of the chattel mortgage at and prior to the date of said agreement, November twenty second, and was and is fully bound by virtue of said chattel mortgage to do and perform all of the things which said agreement requires. Now, those are the two leading propositions. The others are incidental and leading up to them. Now, you go on and make a demand and you receive a certain number of cattle. Beyond that, you set out the notes and indebtedness, the chattel mortgage. Those are the notes for which you admit getting a certain number of cattle, and those that are spoken of so far by the evidence in this case I think commence on November

272 twenty-first, or else it is December 7th, I think these must be the fat cattle in the first shipment. December 1st is the division between the deals, December 7th, it was.

By Mr. NOAH: Might I say a word more before the Court rules?

By the COURT: Just a moment. Your admission is you got eighteen hundred and eighty one head.

By Mr. NOAH: Yes sir, that is what we got.

By Mr. SNODDY: I want to make this point. Mr Noah stated the pleadings would raise this question, it is an action for conversion and the answer is a general denial. Now, the case here is for the wrongful conversion, and if they were not guilty of a wrongful conversion, why of course, there is no case here. Now, can there be such a thing as expense allowed to a party for wrongful conversion of property, for wrongfully converting? Can they come before this jury on the testimony in this case if the property is wrongfully con-

verted and claim their expenses? There is no such thing as permitting expenses in a wrongful conversion.

By Mr. NOAH: We contend this testimony is competent upon either theory. The Supreme Court has decided that there was a consideration here; that is, upon the warrer. We contend that we are able to show a failure of that consideration; then we may choose either to abrogate that contract or go ahead under that contract and charge them with the notes, because——

By the COURT: You do not do it in the pleadings.

By Mr. NOAH: After this case was heard, we made an application to file an amended answer to show that there had been a failure of consideration of the contract, because I say to the Court frankly——

By the COURT: When was that application made?

By Mr. NOAH: At the last term of this court or at some of the adjournments.

273 By Mr. SNODDY: I never heard of it.

By Mr. SWINDALL: The only one we have notice of is the one made here before. There is a motion to strike out part of our answer, part of our reply.

By the COURT: Whatever it is, it is made, so that is the end of that.

By Mr. NOAH: I may be over stating the facts. We certainly filed one motion and it may be the one Mr. Swindall speaks of, but I personally asked the Court to permit us to amend this pleading, that I filed any formal motion or not, I don't know. But assuming there is nothing of the sort on record, standing on the pleadings just as they are——

By the COURT: That is the way you will have to stand.

By Mr. NOAH: Unless the court changes its rule.

By the COURT: I mean, so far as the pleadings are here.

By Mr. NOAH: Yes sir, at this time we contend this evidence is competent under a general denial for the purpose of a partial if not a general denial. This is an action of trover. Our Court has again and again held that a general denial is all that is necessary to raise every issue in an action of replevin.

By the COURT: A general denial would not be necessary to prove any damages or to prove any affirmative right to recover an amount in damages, if it were a class of case where you could do it at all.

By Mr. NOAH: I say it would be sufficient to introduce this particular class of testimony under. As, for instance, if we had nothing here but a general denial and they prove specifically and particularly at every point that we had converted a certain number of head of their cattle, under and by virtue of this contract, by the apparent authority of this contract, wouldn't we be allowed to prove that the agreement was that they were to deliver these cattle

274 and wouldn't we be allowed to prove because of their failure to do that thing they should have done, couldn't we prove that expense under that state of facts then?

By the COURT: I think the pleadings should first——

By Mr. NOAH: Now then, we contend they have only to perform their contract, which they failed to do, and we had the right to

choose and without any specific rescission on their failure to deliver, and that is what we are attempting to prove. Haven't we the right to contend this contract is abrogated and that we will proceed under our previous contract, which is still in existence?

By the COURT: They take two propositions to answer that question. In the first place, before you could take that theory and defend on it, you must rescind your contract and offer back or tender back to the parties what you received, or put them in *statuo quo*. That is the first proposition, and there is no evidence of anything of that kind. And in the second case, under the second proposition, it would not go at all because of the fact you have no pleadings here asking for any amount of that kind, and second you would only be able to deduct that from the amount you gave credit for on the chattel mortgage, and you are not foreclosing the chattel mortgage here, now. There is no evidence indicating that you are foreclosing the chattel mortgage. There was originally the theory here upon which you went that this contract was a nullity, because there was a lack of consideration and therefore you had a right to foreclose the mortgage. There is not a word of evidence to show you sold these cattle under the mortgage.

By Mr. NOAH: We haven't got through yet.

By the COURT: Oh, no, you have not got through, but you have not proceeded so far under that theory; but even, I say, if you did it, it would only be to deduct the amount from the price that the cattle brought. That would not be an off set against any damages incurred by conversion; not at all.

275 By Mr. NOAH: No, but upon that theory there would be a shortage in payment.

By the COURT: The plaintiff in this case must stand on the allegations in the petition or else they go out of court. Now, under your pleadings here, you are asking for no affirmative relief, none whatever. You cannot recover any verdict here if the plaintiff fails to recover, and you cannot recover an affirmative verdict for the amount of these expenses.

By Mr. YOUNG: Will your Honor pardon me one suggestion. As we understand their petition, they are alleging in their petition that they executed this contract.

By the COURT: That is true.

By Mr. YOUNG: That they delivered us every number we are entitled to under the contract and over and above that, they bring a suit in conversion.

By the COURT: Yes sir, they bring a suit in conversion for the conversion of a certain number of cattle.

By Mr. YOUNG: Over and above the number of cattle the contract was agreed upon.

By the COURT: I do not believe they mention the contract; I have not read the petition.

By Mr. YOUNG: Oh, yes, they set up the contract as part of their pleadings.

By the COURT: They might just as well have left it out. It is absolutely surplusage.

By Mr. SNODDY: Certainly it is, but the attorney who drew it is dead now.

By Mr. YOUNG: And that answer was filed under the theory that there was cattle, but it shows up there was no cattle, they are all dead now too.

276 By Mr. SWINDALL: You ought to know; you got the cattle.

By the COURT: Well, now, here. Here is part of it. "That on or about the — day of December, the defendant, James R. Gober, agent and employee of said company, and with the knowledge of the defendant, the Drumm-Flato Commission Company, and in the absence of the plaintiff and without the knowledge or consent of this plaintiff, went into the pasture of this plaintiff and wrongfully, unlawfully, secretly and clandestinely took possession of and drove away all of plaintiff's cattle in said pasture, amounting to four hundred head and have ever since wrongfully and unlawfully retained said possession, and wrongfully and unlawfully, by means of intimidation and threats have prevented this plaintiff taking possession of any of said four hundred head of cattle or any other cattle owned by said plaintiff on the range, and afterwards at different times, the said John Gober personally and as agent and with the knowledge and direction of the said Drumm-Flato Commission Company, wrongfully and unlawfully and forcibly took possession of the cattle of this plaintiff to the amount of three hundred head and still retains possession. Four hundred and three hundred makes seven hundred head. Is that the way you count it?

By Mr. NOAH: They only pray damages for the conversion of four hundred.

By the COURT: "Still retains possession of the same."

By Mr. SWINDALL: Mr. De Geer and Mr. Alexander was in the first case, were in the case first and drew the pleadings, and I think they just claim four hundred head.

By the COURT: That under the terms of said contract, the defendant, The Drumm-Flato Commission Company were entitled to receive nineteen hundred head of cattle. That on the blank day of December, 1900, the said defendants wrongfully and unlaw-

277 fully and forcibly took and carried away four hundred and ten head of cattle, property of this plaintiff, of the value of eight thousand dollars. By reason of said unlawful conversion, this plaintiff has been damaged in the sum of eight thousand dollars. Where is anything in this answer that sets up any item of expense?

By Mr. YOUNG: There isn't anything, your Honor.

By the COURT: Then how can you be entitled to recover it?

By Mr. NOAH: On the theory we are entitled to prove it under a general denial, and then, as a matter of fact, we are foreclosing the mortgage. Now, we expect to show that these cattle were sold under the mortgage, and if our theory is correct, then we are entitled to prove not only what these cattle sold for but also the expense of gathering and selling them. We think it particularly competent here because it goes to the question of delivery under this contract.

By the COURT: You are not asking here by any pleading on the

part of the plaintiff, you are not required in this suit to amend in any way for any money or for any expenses in relation to these cattle or the handling of them under the chattel mortgage.

By Mr. NOAH: I think that is true.

By the COURT: Then why should you prove any of that?

By Mr. NOAH: It is a good defense on our part, to show that we have chattel mortgages. It is a good defense to conversion.

By the COURT: According to this theory, if you are allowed to show you took these cattle under the chattel mortgages then that is answering you did not convert them. Now, if you were allowed to show your sale, it would not be competent to show what expense you paid out. The mortgage covered that.

By Mr. NOAH: Suppose the mortgage covered it and they were sold for a hundred thousand dollars and we only had sixty thousand against them?

278 By the COURT: No sir, that would not be wrongful conversion.

By Mr. NOAH: That is the theory they are going on.

By the COURT: I do not know what their theories are, gentlemen, I am dealing with the facts now, what I get from your pleadings.

By Mr. YOUNG: I don't know the particular amount of these expenses.

By the COURT: The expenses have nothing to do with it, Mr. Young.

By Mr. YOUNG: We have this idea about it, by showing Mr. Bryson paid--Mr. Gober paid the expenses of gathering these cattle, it shows that nobody else paid the expense.

By the COURT: The plaintiff does not claim to have paid it.

By Mr. YOUNG: Then I think it devolves upon you to show we did pay you, that the expense of handling and gathering of these cattle was paid at the expense of the company.

By the COURT: I don't know that makes any difference.

By Mr. YOUNG: I think as a matter of defense we should prove it, not with the idea of getting any judgment or anything of that kind, but it tends to prove we did gather these cattle and gathered them at our own expense.

By the COURT: The plaintiff admits that, as I understand it. From their pleadings, it shows you went and got them, not only that you went and got them but that you went and got them wrongfully, you went and got them in a manner you had no right to do. They allege they delivered the nineteen hundred head.

By Mr. NOAH: Under the contract.

By the COURT: Yes, and that you deny.

By Mr. YOUNG: Now, right on that branch of the case, we want to show that they never did deliver us any.

By the COURT: That is the defendant's proposition, the one you have been trying to show.

By Mr. YOUNG: It is one of the circumstances, if they de-

279 livered these cattle to us, we certainly would not have had to pay the expense of gathering them, these cattle, and it is a

very strong fact that we paid the expenses, that they never were delivered to us.

By Mr. SNODDY: Now, under this contract, let me call your attention to the fact this delivery was to be made—"That the said R. C. Edmisson, second party, hereby agrees to deliver to the said defendant nineteen hundred head of cattle as they run on the range, provided the same can be found to make this number, and on which the Drumm-Flato Commission Company holds a chattel mortgage." They were to be delivered as they ran on the range, on the range, and the defendants so understood it by signing the contract and sending Mr. Bryson down there to gather up the cattle. They understood it was to be a delivery on the range and it was an absolute delivery under our part of the evidence, as they took them at the gate, not at the railroad depot, not at Kansas City, but they were delivered as they ran upon the range. And to show the defendant understood the contract in that matter, they send Mr. Bryson down to gather up the cattle.

By Mr. YOUNG: If your Honor please, we put a different construction on that.

By the COURT: Where were you to deliver them?

By Mr. YOUNG: Why, the contract is absolutely silent as to that, as to that. As they run on the range means that cattle are not to be taken out, topped out, but are to be taken as they come.

By Mr. SNODDY: But that part of it is specified in the latter portion, to be taken as they come.

By Mr. YOUNG: We don't so understand it. "Nineteen hundred — of cattle, as they run on the range, of various ages, on which the said Drumm-Flato Commission Company holds a chattel mortgage, and so forth. Now it is said: "It is further agreed by the parties
280 if Mr. Edmisson gathers as many as two hundred head he is to turn over one hundred head of the two hundred head gathered, or in case Edmisson delivers as many as two thousand head of cattle, any residue thereafter is to be retained by Mr. Edmisson.

By Mr. SNODDY: Well, that very clause there, is the only one that applies. This first part here is to deliver them upon the range, can't get any other meaning out of it, because they specify the grades of cattle.

By the COURT: Let me see that contract. Well, this contract says that Edmisson is to deliver these cattle—"That R. C. Edmisson, the second party, hereby agrees to deliver to the Drumm-Flato Commission Company"—that is, he is to deliver them as they run on the range, provided that many can be found.

By ERSKINE SNODDY: Of various ages.

By the COURT: And he is to deliver the cattle upon which the Commission Company hold a mortgage and then upon the delivery of those cattle, the commission company is to deliver Edmisson his notes, which they hold, and cancel the indebtedness. Now, then, they make another provision here that in case Edmisson gathers as many as two hundred head after the delivery to the Drumm-Flato Commission Company of the nineteen hundred head, then he is to turn over one hundred head, or one half, and that would make two

thousand head altogether. And in case he gets more than two thousand head, or more than twenty one hundred head, he delivers them the two thousand head. In other words, in case he delivers them the two thousand head, why, that cancels the contract, if there are that many, and if there are two thousand head or over two thousand head, if he has twenty one hundred head, he is to deliver two thousand head and he keeps the remainder. Now, the contract says nothing
281 about delivery, as there was nothing said, Edmisson would have to deliver, of course. It takes a delivery to complete the contract.

By Mr. SWINDALL: The delivery to the agent was a delivery to the defendant.

By the COURT: Why certainly.

By Mr. SNODDY: Mr. Bryson went there for the company to gather those cattle. They were mere volunteers and couldn't charge anything for it.

By the COURT: That is immaterial. There is nothing here that will allow evidence to be introduced to show any expense of that kind. They may show what they did, if they wish to do so.

By Mr. NOAH: So we can save the record, we would like to have that last question read.

Here the stenographer reads as follows:

"Q. Mr. Bryson, do you remember what amount of expense you paid in rounding up these cattle after the twenty second of November, after this contract was made?

By Mr. NOAH: Is that objected to?

By Mr. SWINDALL: Yes sir.

By Mr. NOAH: The objection sustained?

By the COURT: Yes sir.

By Mr. NOAH: The defendant excepts.

Q. Mr. Bryson, state to the jury whether or not Mr. Edmisson gathered and delivered to you any cattle?

By Mr. SWINDALL: Objected to as calling for a conclusion.

By the COURT: Objection sustained. He may state the facts.

Q. Well, what was done, Mr. Bryson, by you when you come down here after this contract was made on the twenty second of November, 1899?

282 By Mr. SWINDALL: Object to it as incompetent, irrelevant and immaterial, and a repetition. The witness has told all that.

By the COURT: It is competent, but I think he has gone all over that ground.

By Mr. YOUNG: I am a little of that opinion myself that he has gone over the ground.

By the COURT: He stated all that, even up to the hour of loading that they went to Kansas City.

By Mr. YOUNG: Well, I am a little of the impression he went over that myself.

By Mr. SNODDY: Everything but the incidents on the road. I believe there was nothing said about that, up to this time.

By Mr. YOUNG: Your Honor, I will ask this question as to who paid the expense of gathering these cattle?

By the COURT: You say you ask that question?

By Mr. YOUNG: I am asking that question.

By Mr. SWINDALL: Objected to——

Q. Mr. Bryson, who paid the expense of gathering these cattle you got after the twenty second of November, 1899?

By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

By Mr. YOUNG: Except. That is all Mr. Bryson.

A. Answer that question?

By Mr. YOUNG: I say, that is all.

By Mr. SWINDALL: That is all.

By Mr. NOAH: Defendant now offers in evidence the deposition of J. L. Burnett.

By Mr. SNODDY: Let me see. I think that is the deposition we have an objection to, but I think they are in the record.

283 By Mr. NOAH: There are objections in the record, yes sir.

By Mr. SNODDY: There is one deposition that is objected to all the way through.

By Mr. SWINDALL: That is the one Judge Robinson took at Kansas City.

By Mr. SNODDY: Well, we will object as they go along.

By Mr. NOAH: Yes, object as they come along.

Here H. A. Noah reads the deposition of J. L. Burnett, as follows:—

Notice to Take Depositions.

TERRITORY OF OKLAHOMA, *County of Woods, ss:*

In the District Court of the Sixth Judicial District of the Territory of Oklahoma, Sitting in and for the County of Woods.

R. C. EDMISSON, Plaintiff,

vs.

DRUMM-FLATO COMMISSION COMPANY, a Corporation, Defendant.

The said R. C. Edmisson and his attorneys of record, Temple Houston, D. P. Marum, Charles Swindall and Snoddy and Son will take notice that on Thursday, the third day of December A. D. 1903, the defendant above named will take the depositions of sundry witnesses to be used as evidence in the trial of the above cause in said court at the office of Botsford, Deatherage and Young, 621 New York Life Building, in the City of Kansas City, in the County of Jackson, in the State of Missouri, between the hours of eight o'clock A. M.

and six o'clock P. M. of said day and that the taking of same will be adjourned and continued at the named place and between the said hours until they are completed.

BOTSFORD, DEATHERAGE & YOUNG AND
H. A. NOAH,
Att'ys for Defendant.

284 Service of the above notice is hereby acknowledged to have been made on us this 30th day of November, 1903.

D. P. MARUM,
Attorneys for Plaintiff.

Depositions of witnesses, taken to be used in an action pending in the district court within and for the county of Woods, in the Territory of Oklahoma, wherein R. C. Edmisson is plaintiff and Drumm-Flato Commission Company is defendant, in pursuance of the notice hereto attached, and on the 3rd day of December A. D. 1903, and at the law office of Botsford, Deatherage & Young, 621 New York Life Building, in the City of Kansas City, in the county of Jackson and State of Missouri, said depositions being taken on behalf of the defendant.

Plaintiff appeared by his attorney, Elijah Robinson, and defendant appeared by its attorney, O. G. Young.

And thereupon the said defendant produced the following witnesses in order, to wit:

JOHN L. BURNETT, of lawful age, who being first duly sworn deposes and says:

Direct examination by Mr. O. G. YOUNG:

Q. What is your name?
A. John L. Burnett.
Q. Where do you reside, Mr. Burnett?
A. 1119, Agnes Avenue.
Q. Kansas City, Missouri?
A. Kansas City, Missouri.
Q. How long have you resided in Kansas City?
A. Twenty six years.
Q. In what business are you engaged?
A. Bookkeeper and live stock commission business.
Q. For whom are you now acting as bookkeeper, if any one?
A. Scroggin Commission Company.
285 Q. How long have you been bookkeeper for the Scroggin Commission Company?
A. Eleven months.
Q. Who were you with as bookkeeper prior to the time you went with the Scroggin Commission Company?
A. Evans-Snider Commission Company, or Evans, Snyder-Buell Company is the proper title.

Q. And who were you acting as bookkeeper for before you went with Evans, Snyder-Buell Company?

A. Drumm-Flato Commission Company.

Q. Do you remember about what time you were working for the Drumm-Flato Commission Company?

A. 1898, 1899, 1900, no, let me see. 1899, 1900 and 1901.

Q. About what time did you begin working for them in 1899?

A. January first.

Q. Were you acting in the capacity of bookkeeper for them at that time?

A. Yes sir.

Q. I will ask you, Mr. Burnett, what book this is I now hand you?

A. Sales book.

Q. The sales book for whom?

A. Drumm-Flato Commission Company.

Q. What do you mean by sales book?

A. The sales book is the record of all the sales made in the yards here by the Drumm-Flato Commission Company.

Q. Did you keep that book for them at the time you were in their employ?

A. Yes sir.

Q. In whose handwriting are the entries in that book on page 415?

A. Well, some of them are in mine and some of them are not. All of the entries on that page are in my handwriting, except a few postings to the ledger, which have nothing to do with the entry of the sales proper.

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Q. Now where did you get your information from which you made these entries on this sales book?

A. From the stock yard company's scale tickets.

Q. Stock yard company's scale tickets?

A. Yes sir.

Q. And were those scale tickets in your possession or are they in the possession of the Drumm-Flato Commission Company?

A. No sir, they are in the possession, or should be, of the buyers of the cattle or stock.

Q. Then how is it that you got these tickets from which to make the entries in this original book of entries?

A. When the Drumm-Flato salesmen made the sales, the cattle were weighed by the stockyards company and tickets delivered by the stock yards company's employés to the employés of the Drumm-Flato Commission Company, from whom I got them.

Q. Then what did you do with the tickets after you got them?

A. I figured the tickets, made the extensions and then *and then* made my entries on the sales book.

Q. Then what becomes of them?

A. Then I render invoices covering the tickets and attach the tickets to them and send them to the buyers.

Q. Send them to the buyers of the cattle?

A. Yes sir.

Q. You then have no further possession of the tickets than simply to make the entries in this original sales book?

A. That is all. After the entries are made, the tickets leave our possession. By the way, that applied then, don't apply now. We have a new system.

287 Q. I don't care about what you have now. Did you make these entries in this book at the time of the transactions therein?

A. Yes sir.

Q. All of them?

A. All of them.

Q. Did you make this record of the transactions the day they occurred?

A. Yes sir.

Q. I will ask you to turn to the date of December 11, 1899, on what page do you find that date?

A. Page 418.

Q. Of what book?

A. Sales book.

Q. Are those entries in your handwriting?

A. Yes sir.

Q. Do you find anything on that date as to cattle received from Mr. Edmisson?

My Mr. MARUM: Wait a minute. Objected to as incompetent, irrelevant and immaterial.

By Mr. NOAH: I will read the objection in the record, I suspect it is the best one. Plaintiff objects to the witness stating the contents of that book, for the reason that the book itself is the best evidence, if the matter is competent at all; and for the further reason, that said book is not a book of original entries and plaintiff being no party thereto is not bound by anything therein contained.

By Mr. SNODDY: And I want to make a further objection. It discloses there is a yard book——

By the COURT: But it is plain, gentlemen. The objection will be sustained. It is not competent.

By Mr. NOAH: The defendant excepts.

288 Here Mr. Noah continues reading the deposition as follows:

Q. From whom do you find the account sales for sixty seven head of cattle on that date?

By Mr. SNODDY: Incompetent, irrelevant and immaterial.

By the COURT: Sustained.

By Mr. NOAH: We except.

Q. Now, on page 415, do you find any account sales there for cattle, and if so, how many and who was the consignor?

By Mr. NOAH: "Plaintiff objects to the last question for the reasons given in the objection last above noted."

By the COURT: The objection is sustained.

By Mr. NOAH: Except.

Q. How many cattle were there, leaving out the calves?

By Mr. SNODDY: Same objection.
By the COURT: Same ruling.
By Mr. NOAH: Exception.

Q. Then how many calves?

By the COURT: Same ruling.
By Mr. NOAH: Exception.

Q. Who were these cattle consigned from?

By Mr. SNODDY: Same objection.
By the COURT: If he knows who they were consigned from, he may state. There is no dispute here as to from whom they were sent. They may answer that question.
By Mr. SWINDALL: Note an exception.

Q. The question is who were the cattle consigned from? Answer is: "From J. F. Bryson, to the Drumm-Flato Commission Company."
Q. Were the cattle that were sold for Bryson on December 7th, 8th and 11th all consigned in the same way?

By Mr. SWINDALL: That part of it we object to.
By the COURT: Objection overruled.
By Mr. SNODDY: Exception.

289 A. Yes sir.
Q. From what point were these cattle shipped?

By the COURT: He could not testify to that.
By Mr. MARUM: Object.
By Mr. NOAH: I was waiting for the objection, but it didn't come.
By Mr. SWINDALL: We object as incompetent, irrelevant and immaterial.

Q. Does that book show any other entries than the—does that book show any other entries of cattle from J. F. Bryson, Curtis, Oklahoma, along about this time than the ones that you speak of?

By Mr. SNODDY: Same objection.
By the COURT: Objection sustained.
By Mr. NOAH: There is a long objection here, but I will not read it. Except.
Mr. NOAH reads: "Mr. YOUNG: I now offer in evidence the entries on page 415 and page 418, giving the account sales of the cattle consigned by J. F. Bryson, Curtis, Oklahoma, to the Drumm-Flato Commission Company, December 7th and 8th, 1899, showing the sale of 1250 cattle and 243 calves; and the account sales of cattle consigned by J. F. Bryson, Curtis, Oklahoma, to Drumm-Flato Commission Company, sold on December 11, 1899, 67 head of cattle. This is merely Mr. Young's statement before the notary public.
By the COURT: Oh, the jury will not absorb anything that is improper here.
By Mr. SNODDY: Well, I suppose they are not to pay any attention to it.

By Mr. NOAH: They will. There is an objection in there.
By Mr. YOUNG: Robinson asks him a question before that.
By Mr. SWINDALL: Well, we object to it now as incom-
290 petent, irrelevant and immaterial and not the best evidence.
By the COURT: Objection sustained.
By Mr. NOAH, reading: "By Judge Robinson, question:
By the COURT: You need not ask anything that he says.
By Mr. NOAH: It is in their examination.
By the COURT: That will be for them.
By Mr. NOAH: We offer it.
By the COURT: You may, if you wish.
By Mr. NOAH, reading deposition:

"Judge ROBINSON:
Q. You say you made all the entries that are contained in the two pages, or in the account referred to by Mr. Young in the last question?
A. I made all the entries of actual sales. The other bookkeeper made the posting entries; that is, all the references to the ledger page to which these accounts have been posted. All the original entries though, were mine.
Q. What do you mean by original entries?
By Mr. SNODDY: Is this cross examination?
By the COURT: He is offering it as his own witness, as he has a right to do.

By Mr. SNODDY: We object to all of it as incompetent, irrelevant and immaterial.
By the COURT: Well, you have gone now as far as you have gone without any objection.
A. That is really a book of original entries in the commission business, as the entire are made direct from the sales tickets to that book.
Q. You made those entries, did you?
A. Yes sir.
Q. You made the entries that you have referred to, all of them?
A. Yes sir.
291 Q. When did you make them?
A. I made them as soon as the sales tickets came in out of the yards, which was on the same day the cattle were sold.
Q. You mean to say now that all the entries in that book purporting to show sales of cattle consigned by Bryson to the Drum Flato Commission Company were made on the days that the cattle were sold?
A. Yes sir.
Q. Didn't you testify in the case between the Gerlach Bank and the Drumm Flato Commission Company here some time ago?
A. Yes sir.
Q. Didn't you testify on that occasion that you didn't make them on the same day?
A. I don't remember.
Q. Didn't you testify that some days, some times you would get busy and it would be several days before you made them?

A. It is never several days.

By Mr. NOAH: When I wait for you to make objections you don't do it.

By Mr. SWINDALL: I thought it was some examination as to the competency of the witness.

Q. Didn't you testify on that occasion that certain sales made on the 11th were not entered until the 14th of the month?

A. No sir, didn't testify to that, because it is very improbable, almost impossible; block the game if you wait that long.

By Mr. NOAH: Then here comes Judge Robinson's objections to the previous questions. "I object to the testimony offered by Mr. Young, what he calls the entries on that book, for the reason that it is not a book of original entries, for the reason that the witness does not profess to have any personal knowledge of whether the entries are correct so far as showing actual sales or not, all
292 the information he has having been obtained from somebody else; and for the further reason that the plaintiff in this case was in no way a party to the making of those entries and is not in any way bound by them, and for the further reason that the book itself, if the entries are competent at all, is the best evidence.

By Mr. SNODDY: That is a Missouri objection. You have to state the particular grounds of the objection in that state. Let the court pass on it.

By the COURT: I have already passed upon those matters.

By Mr. NOAH: Now, Mr. Young resumes.

By Mr. YOUNG:

"Q. You will permit the notary public to make a copy of these accounts as a part of your deposition, will you, Mr. Burnett?

A. Yes sir.

Copies of said entries offered in evidence by defendant, on pages 415 and 418, respectively, given the account sales of the cattle consigned by J. F. Bryson to the Drumm Flato Commission Company, and sold by said Commission Company on December 7th, 8th and 11th, respectively, are made by the notary public taking this deposition from the sales book of said Drumm Flato Commission Company and said copies are attached hereto and made a part hereof and marked respectively Exhibits "A" and "B."

By Mr. SNODDY: Is that the question?

By Mr. NOAH: No sir, that is the deposition, the offer.

By Mr. SNODDY: Well, we object to that as incompetent, irrelevant and immaterial.

By the COURT: Object to what?

By Mr. NOAH: Defendant offers copy of Exhibit A.

By the COURT: Yes sir, what is your objection to this copy?

By Mr. SWINDALL: Incompetent, irrelevant and immaterial.

By the COURT: The objection is sustained.

293 Mr. NOAH: Sustained? Defendant now offers Exhibit "B."

By Mr. MARUM: Same objection.

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The COURT: Same ruling.

By Mr. NOAH: Offers Exhibit "B" attached to the deposition of John L. Burnett.

By Mr. SWINDALL: Objected to as incompetent, irrelevant, and immaterial.

By the COURT: The Court has ruled.

By Mr. NOAH: The defendant excepts.

Mr. Noah continues reading deposition as follows:

Q. Now, speaking about this being the original entry, I will ask you if this is the original book used in the commission business at this time, or at the time this book was used by the Drumm Flato Commission Company?

By the COURT: That has been gone over a number of times.

By Mr. NOAH: There is an objection and a motion to strike out the answer.

By the COURT: The objection is sustained.

By Mr. NOAH (reads):

"Q. I will ask you if there is another entry made by the Drumm Flato Commission Company, or was there another entry made by the Drumm Flato Commission Company in reagrd to the sales of these cattle in any other book in their office at the time these entries were made?" That is objected to as being irelevant and immaterial.

By the COURT: Sustained.

By Mr. NOAH: Except.

Q. And they were made as you have stated, from the tickets produced by the stock yards company?

By Mr. SNODDY: Same objection.

By the COURT: Sustained.

By Mr. NOAH: Exception.

Q. And all these entries are in your handwriting, as you have stated?

294 By Mr. SNODDY: Same objection.

By the COURT: Same ruling.

By Mr. NOAH: Exception.

"Q. Now do you know anything about whose cattle these were at the time they were consigned by J. F. Bryson or do you know to what account these proceeds went?

By Judge ROBINSON: I object to that unless the witness knows personally."

By the COURT: If he knows he may answer.

By Mr. SNODDY: Let the court see the answer. If there is no objection is the record, make the objection that is is incompetent, irrelevant and immaterial.

By the COURT: It is a mere supposition.

By Mr. NOAH: What does the Court do with the objection?

By the COURT: I sustain the objection, unless the witness knows of his own knowledge whose the cattle were.

By Mr. NOAH: Well, I offer the answer for what it is worth.

By Mr. SNODDY: Well, sir, we object to it, the answer doesn't show.

By the COURT: The answer doesn't show that he knows. Says he remembers, if he remembers or understood so and so.

By M. NOAH: Very well. The defendant excepts.

By Mr. NOAH (Reading): "Q. As agent for——" then comes an interruption, and the answer: "A. As agent for the Drumm Flato Commission Company——" hold on, that is the answer. You had better look at this and understand it.

Here Mr. Noah hands deposition to Mr. Snoddy.

By Mr. SNODDY: The question seems to be as agent for, and then a blank and the witness interrupts.

By Mr. MARUM: We object to it as incompetent, irrelevant and immaterial.

295 By Mr. NOAH: Well, leave that whole matter out.

By Mr. SWINDALL: And hearsay.

By Mr. NOAH: Judge Robinson objected and then the cross examination.

By Mr. SWINDALL: We don't want it.

By Mr. NOAH: Also offer the cross examination of this witness by Judge Robinson.

Q. Now, Mr. Burnett, when were those cattle sold that are referred to upon page 415 of the book you have been referring to?

By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

By Mr. NOAH: Except.

Q. Now, you stated a while ago that they were sold on the same day that the entry made on that book; that is true, were those entries made there on the 7th, 8th and 11th of December?

By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.

By the COURT: Same ruling.

By Mr. NOAH: Except.

Q. Just answer my question first, were those entries made on the 7th, 8th and 11th of December?

By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial, and not the best evidence.

By the COURT: Same ruling.

By Mr. NOAH: Exception.

Q. Don't the books show when they were made?

By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

By Mr. NOAH: Except.

Q. I understand that, but when were these entries made?

296 By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.
By the COURT: Same ruling.
By Mr. NOAH: Except.

Q. I am not asking you when they were supposed to be made; when were they made?

By Mr. SWINDALL: Same objection.
By the COURT: All those questions along that same line may be considered as having been objected to and the Court will make the same ruling.
By Mr. NOAH: It is hard to pick out any particular matter.
By the COURT: Read them, then.

Q. Now you testified on the trial of this case between the Drumm Flato Commission Company and the Gerlack Bank in the Circuit Court of Kansas City about the 14th day of October, 1902, did you not?
A. I testified about that time.
Q. Now you remember Mr. Botsford asking you this question and you answering it in this way: "Q. Now turn to that entry and read the entry in regard to the Edmisson cattle? A. They are billed in the name of Bryson; it shows 1250 head of cattle." You remember that?

By Mr. SNODDY: Now, that is objected to as incompetent.
By the COURT: Objection sustained.
By Mr. NOAH: Except.

Q. You say you didn't testify in those exact words?

By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.
By the COURT: Sustained.
By Mr. NOAH: Except.

Q. In point of fact, if you testified that way, it wasn't correct, was it?

297 By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.
By Mr. MARUM: Incompetent, irrelevant and immaterial.
By the COURT: One at a time, gentlemen.
By Mr. SNODDY: Go ahead and make the objection.
By the COURT: Same ruling.
By Mr. NOAH: Except.

A. If I testified in what way?

By Mr. MARUM: Objected to as incompetent, irrelevant and immaterial.
By the COURT: Same ruling.
By Mr. NOAH: Except.

Q. That the entry shows 1250 cattle?

By Mr. MARUM: Objected to as incompetent, irrelevant and immaterial.

By the COURT: Same ruling.

By Mr. NOAH: Except.

Q. Four of them belonged to somebody else, but weren't there 288 more 243 or some other number?

By Mr. MARUM: Objected to as incompetent, irrelevant and immaterial.

By the COURT: Same ruling.

By Mr. NOAH: Except.

By the COURT: Wait a minute, gentlemen, we will take a recess. Remember the admonitions the court has heretofore given you. Do not talk about this case nor allow any one to talk to you nor talk to any one else nor among yourselves, nor form nor express an opinion in the case, until it is finally submitted to you. Ten minutes recess.

Here Court took a recess for ten minutes. After recess, the trial of the above cause was resumed. Jury all present; counsel for plaintiff and defendant present.

298 By Mr. NOAH: The defendant offers the deposition of John L. Rune.

Mr. NOAH (Reading): John L. Rune, of lawful age, being produced, sworn and examined on the part of the defendant, deposes and says:—

Direct examination by Mr. O. G. YOUNG:

Q. What is your name?

A. John L. Rune.

Q. What is your age, Mr. Rune?

A. Thirty three.

Q. What is your occupation?

A. Sell cattle and butcher's stuff for Drumm and also yard man.

Q. You mean Drumm Commission Company?

A. Yes sir.

Q. How long have you been yard man for the Drumm Commission Company?

A. Well, ever since they have been in business. I think it has been eleven or twelve years.

Q. What are your duties as yard man, Mr. Rune?

A. Why, I am supposed to count in all these cattle as they are turned over from the yards company to me; also with the yards company's division man. We both count these cattle as they go in the pens, get them put in location, proper location, then I sort them, putting them according to the way they sell, their brand, every brand.

Q. After you receive these cattle and count them and they are located in the pens that you used, your several pens, and after you tally the cattle, then what do you do with these tallies?

A. I then make out a separate tab for Lampe and also for the other salesmen, giving them the counts of every man's cattle, how many he has got in each pen and the kind of cattle they are.

Q. Do you make a report of this tally and count anywhere else?
A. Yes sir; to the bookkeeper.
Q. At the office?
A. At the office, yes sir.
299 Q. Drumm Commission Company's office?
A. Yes sir, Drumm Commission Company's office.
Q. You spoke about turning these tallies over to the salesman who sell these cattle, do you r-member who your salesmen were in 1899?
A. Yes sir.
Q. Who were they?
A. J. H. Lampe and G. B. Kelley.
Q. Who takes charge of these cattle when they are unloaded off of the cars?
A. The yards company.
Q. Then the yards company turn them over to you?
A. Yes sir.
Q. Does the yard company count these cattle when they are received from the railroad?

By Mr. MARUM: Objected to as incompetent, irrelevant and immaterial.
By the COURT: The question is what they do.
By Mr. SNODDY: I suppose the object of this deposition is to prove the number of cattle in the yards?
By the COURT: I do not know until I hear.
By Mr. SNODDY: The best evidence of course is the original evidence, the consignment, anything of that sort, would be the best evidence.
By the COURT: I will hear what it is.

A. They count them out of the shutes.

By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.
By Mr. SNODDY: That is the number received by the Drumm Flato Commission Company——
By Mr. SWINDALL: At Kansas City, we were to deliver to them to *to* their agent.

Q. Out of the shutes?
A. Yes sir.
300 Q. Then where do you usually count them; where are the cattle?
A. We count them at the pens, take them to the pens and count them there with the yard company's division man.
Q. Then, you in connection with the yard company's division man, count them over again at the pens?
A. Yes sir.
Q. Well, if there is a discrepancy in the number there and those they have tallied out of the shute, what then is done?
A. I then report it to the claim agent and he comes down and if there is a miscount, we count all these cattle over again, I and the claim agent and also the division man.

Q. Is there any record made of these cattle by the yard company?
A. Yes sir.
Q. Do you know R. C. Edmisson of Woods C-unty, Oklahoma?
A. Yes sir.
Q. How long have you known him, Mr. Rune?
A. I have just known him since he had them cattle in down there.
Q. Were you acquainted with the R. C. Edmisson cattle?
A. Yes sir.
Q. Do you remember what the brands of his cattle were?
A. Yes sir.
Q. Please state what the brands of his cattle were that he shipped in?
A. They were 55 bars, 55's, J. W.'s and X 2 bars.
Q. Had he been doing business with the Drumm Flato Commission Company for some time?
A. Yes sir.
Q. Do you remember of any of the cattle of the above brands being in the yards consigned to the Drumm Flato Commission Company during the month of December, say from the 5th to the 15th?
301 A. Yes sir, I don't know the exact date, but along in between there from the first to the 15th, along there.
Q. Do you know about how many cattle there were in the above brands at that time?

By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial.

By Mr. SNODDY: This is not a count that was taken from the cars there. It is incompetent, irrelevant and immaterial.

By the COURT: That may all be, only if he knows what were there, why would it not be competent to let him state for what it is worth? The thought has been running in the mind of the court whether he knows that testimony of his knowledge.

By the COURT: He discloses from his testimony that he has some duty to perform in separating the cattle, getting them into the pens, receiving them second hand from other parties.

By Mr. SNODDY: He don't receive them from the railroad company.

By the COURT: No, certainly not, but if he knows how many there is there, it may be competent for whatever it is worth.

By Mr. SNODDY: At the same time the evidence is undisputed in this case if it is told at all, the count, it must have been made at the other place.

By the COURT: Whatever bearing this may have upon what cattle were delivered, it may go in; the weight of the testimony, however, is for the jury.

By Mr. SNODDY: The delivery, as I understand, is made to the yard man and by the yard man to the commission company and this is testimony of an employee of the commission company as to what he got there.

By the COURT: Yes, that only serves to weaken the testimony and does not go to its competency.

Here the stenographer reads as follows:—

302 Q. Do you know how many cattle there were in the above brands at that time?

By the COURT: He may answer the question.
By Mr. SNODDY: He don't state where.
By Mr. SWINDALL: Exception.
By the COURT: I don't care where.

A. Oh, all the brands together?
A. Yes sir, the 55's, 55 bars, J. W.'s, and X 2 bars?
A. Yes sir.
Q. How many?
A. 1250 cattle and 243 calves.
Q. Were all of these 1250 in the brands above?
A. How is that?
Q. Were all of these 1250 that you have just mentioned in the brands above?
A. Yes sir; that is, counting calves, 1250 cattle and 243 calves.
Q. Were these 1250 cattle were they all in those brands, or were some of them cut out?
A. Why, there was three, I think, cut out, claimed by the inspector.
Q. The rest of the cattle then were in the brands that you have above mentioned?
A. Yes sir.
Q. What did you do with these cattle, Mr. Rune?
A. After I sorted them?
Q. Yes; what makes you remember distinctly about this bunch of cattle coming in at this particular time?
A. Because I think it is the hardest job I ever put in on a bunch of cattle, in sorting them, so many of them and all mixed up and I had instructions from Lampe to class each brand separate and did class them after I had the brands sorted.

303 Q. Do you remember whether Mr. Edmisson was present that day?

A. Mr. Edmisson was there when I was sorting some of them, he was on the fence with me.
Q. Do you know who consigned the cattle at that time?

By Mr. SNODDY: Objected to as incompetent, irrelevant and immaterial.
By the COURT: Oh, if he knows he may answer. I don't know how he knows. I do not suppose that is a very material proposition, one way or the other. He may answer.

A. Yes sir, J. F. Bryson, I think, is the way they were consigned at that time?
Q. Curtis, Oklahoma?
A. Yes sir.
Q. Was Mr. Bryson in with the cattle too at that time.
A. He was there, yes sir.

Q. Were there any cattle following this bunch in the same brand shortly after that time? If so, how many about?

A. Why, there were two loads, I think, after that; about 64 cattle. I think there was some came in two or three days afterwards, perhaps four or five days afterwards.

Q. What brands were they in?

By Mr. SNODDY: Objected to as incompetent, irrelevant and immaterial. Seems to me entirely too remote. Shows from the testimony of this witness himself that they were consigned by Bryson. The evidence shows they were sent from Curtis——

By the COURT: I think it has some bearing upon the number of cattle received. How little or much is for the jury.

By Mr. SNODDY: Exception.

By Mr. NOAH (Continues reading.):

A. They were in the same brands.

304 Q. Was Mr. Edmisson or Mr. Bryson either with those two car loads.

A. Well, now, I don't remember, but I think they were there; there was one of them there sure, pretty sure they were.

Q. Do you remember of any other cattle of this brand being shipped by Mr. Bryson or Mr. Edmisson after that during that month?

A. No sir.

Q. Are you still employed by the Drumm — Commission Company?

A. Yes sir.

Q. What is your address, Mr. Rune?

A. 1628 Madison.

Q. Kansas City, Missouri?

A. Kansas City, Missouri, yes sir.

Q. What kind of cattle were these that you have just testified about?

A. They were cows, steers, bulls, calves, little of everything.

Q. Mixed lot?

A. Mixed lot, yes sir; all came in mixed.

Q. Who did you give the information of your count and tally to at the time you counted and tallied these cattle?

A. Give it to Burnett, our bookkeeper.

Q. Who? Jack Burnett?

A. Jack Burnett, yes sir.

Q. Was he your bookkeeper at that time?

A. Yes, sir, he was our bookkeeper at that time.

Q. Was that the usual and customary way of doing the business?

A. Yes sir.

By Mr. NOAH: We don't care to offer the cross examination.

By Mr. SNODDY: Well, we will offer it.

By the COURT: If you read that cross examination which is upon that portion ruled out, it will be necessary to let the examination in chief in.

By Mr. SNODDY: There is nothing been ruled out, has
305 there?

Here Charles Swindall reads the cross examination of John L. Rune, as follows:

Cross-examination by Judge ELIJAH ROBINSON:

Q. How long have you been working in that capacity for Drumm-Flato Commission Company?

A. Ever since they were organized, about eleven or twelve years.

Q. How many head of cattle do you suppose you counted in that length of time?

A. Oh, I don't know, good many of them. You see we handle a good many of them in busy time of year. We have handled as high as 136 loads a day.

Q. 136 loads, that would be——

A. That is counting both sides, be counting the quarantine. I don't run the quarantine side.

Q. That would be between 2500 and 3000 a day, 136 loads, take 20 to a load would be 2700.

A. Yes sir; they average 25 the way we figure, that is the way we estimate our loads.

Q. You some times run as high as 3000 a day then?

A. Well, no; we had one day 136 loads, that is a big day; many days we have 80 to 90.

Q. Car loads?

A. Yes sir.

Q. 80 car loads at 25 a car load would be 2,000 a day, and what is the average take the year around, what do you think would be the average the year around?

A. Of cattle in the car.

Q. No, average number of cars you handle a day?

A. Oh, the average? Oh, I don't know, we run, I should judge we average 30 loads year around, may be 40; I don't know exactly, 30 or 40, perhaps 30 would catch it.

306 A. That is 750 cattle a day average?

Q. I think around in there somewhere. Of course, I am not positive of that, because on Saturdays we don't get nothing.

Q. Well, I am not talking about Sundays, I mean week days?

A. Saturdays, I am not talking about Sundays.

Q. That would be 225,000 a year?

A. Well, that is counting loads of everything, you know; that is counting hogs, sheep and cattle, understand me.

Q. I am not talking about hogs and sheep.

A. That is what I am counting, the total a day; we figure every thing in.

Q. I didn't ask you about hogs and sheep. I asked you how many cattle, how was I supposed to know you were referring to hogs and sheep?

A. I didn't understand you?

Q. Let's go back to cattle then. How many cattle do you average a day, how many car loads do you think, on an average?

A. Well, now, I tell you we run as high as 4500 a year, loads of everything; how many cattle there is, how many cattle in that, I don't know.

Q. Well, can't you give an approximately reliable estimate of the number of cattle that you think you would handle on an average through a year?

A. Well, I think it would be safe to say 20 loads a day, average 20 loads.

Q. Of cattle?

A. Yes sir.

Q. And how many would they average to a load, 25?

A. About 25.

Q. That would be 500 a day and counting three hundred
307 working days to the year would be 1,250,000 head of cattle. Now, how long has it been since these 1250 cattle were shipped in?

A. Well, it was in 1899 some time, some time in December.

Q. Well, what time in December?

A. Well, I don't know the exact dates, but it is along from the first to the 15th: I don't know exactly the dates.

Q. All came in together, or came in different shipments?

A. Came in different shipments; had some come in two, three, four days afterwards, couple of loads.

Q. About how many came in the first shipment?

A. There is 1250 cattle, I think, and 243 calves.

Q. In the first shipment?

A. In the first shipment that we had, yes sir.

Q. Now a couple of loads came in afterwards?

A. Yes sir, three or four days afterwards, if I remember right.

Q. Now do you mean to state to the notary public that you can remember as far back as December, 1899, which is now four years ago, the fact that 1250 head of cattle and 243 head of calves were shipped in in one shipment by some man?

A. Yes sir, I do. This deal I will remember if I live to be a hundred years old. I put the hardest work on them I ever put in; worked with them right along and counted them. I was told to be very particular to get the tally on these cattle right. I will remember that for all time; never have done any work like that before.

Q. And because of your putting in that sort of work you now tell this notary that you can remember four years ago that you had 1250 head of cattle and 243 calves?

A. Yes sir.

Q. Now was there anything in that shipment to impress upon your mind the number of cattle and the number of calves any more than in any other shipment that was made?

308 A. Yes sir, simple reason I had to class all the brands, every brand. I had to class the cattle myself on the yard company's count in lists and when we got the cattle counted they didn't tally. They have a man count them as they come out of the shutes, one man counts the cattle and another man counts the calves; anything that weighs over 300 pounds is called cattle; after

we got them counted they had more calves than we did, but less cattle.

Q. Well, would that make you remember the number?

A. Now wouldn't I remember if I sorted there and never got anything to eat from morning to night and just stayed there all day long and counted them all the time; never forget that.

Q. The fact that you worked all day long without something to eat would you think impress upon your mind or memory the number of cattle so you wouldn't forget it?

A. No, not just that particular thing.

Q. What was it then that impressed the number of cattle upon your mind so you couldn't forget it, notwithstanding you counted over a million cattle?

A. I was told to take particular pains to get those cattle counted right, get the tallies right and I took pains to see I had everything right and anything that wasn't all right I wanted to know it.

Q. Aren't you told that in every case?

A. Yes sir, but this here was an extra large deal and it took lots more work and took a little more counting and everything else.

Q. Do you mean to say the bigger the drove of cattle the more likely you are to remember the number?

A. Yes sir, I do. Get lots of little deals of only one or two car loads, but never got a big string like that before. I have been in the yards, eighteen, nineteen years, never had such a string as that before.

Q. Never had 1250 before at one time?

309 A. Not at one time.

Q. Now when did Mr. Edmisson ship in any cattle before.

A. Well, I don't just remember when he shipped any in before.

Q. You don't know?

A. No sir.

Q. About how long before this was it?

A. Well, I can't tell, because I don't remember all the names unless, just, of course, I have deals we keep a tab of; haven't kept any of the tabs on account of the flood. Flood washed out, wet all our cards and wet them so we threw them all away.

Q. I am not talking about the tally cards that you kept, I am talking about your memory. Now you have testified you remember about the number of cattle that were shipped in on that occasion, you spoke of the number of what you call cattle and what you call calves?

A. Yes sir.

Q. Now, I want to know when he shipped in any before that?

A. Well, I don't remember.

Q. Can't you give anything like a fair guess at it?

A. No sir.

Q. Had he shipped any in within a year?

A. Well, I don't remember that.

Q. You mean to say now that you can't testify whether or not Mr. Edmisson had shipped any cattle within a year prior to December, 1899?

A. Yes sir.
Q. You don't know whether he shipped any in September or not?
A. No sir.
Q. Do you remember of his shipping any in in October?
A. No sir.
Q. Do you remember of his shipping in some 600 or 700 head in October?
A. No sir.
310 Q. Will you say that he didn't do it?
A. No sir.
Q. You remember of counting a whole lot of cattle there that he shipped in on the 19th day of September, 1899?
A. Well, I may have counted them and not remembered the names.
Q. Well, did you or not?
A. I may have counted them.
Q. Have you any recollection of counting them?
A. I counted them if they got in there and if I was there that day.
Q. Have you any recollection of counting them?
A. Well, I don't know, I might have counted them. If they came in and I was there I sure counted them.
Q. That is not the question. You know whether you remember or not?
A. I ain't sure. I can't tell.
Q. You are bound to tell whether you remember or not?
A. Well, I don't know. I didn't get the names, I don't get all the names so far as that is concerned right then. I might have counted the cattle there and think nothing of it. I count thousands of cattle and I don't think nothing more of them at all, unless I am told to take particular pains and see that they are tallied and everything.
Q. You said you were told to take particular pains with everything?
A. Yes sir, that is right, but I don't know always whose they are.
Q. What occasion is there for you to remember whose they are?
A. What occasion is there?
Q. Don't you keep a tally there and give it to somebody else?
A. Yes sir.
Q. What occasion is there for you to remember whose they are and the occasion of it?
311 A. There isn't any unless I am told to take particular pains with them.
Q. Who told you to tally them?
A. Lampe. If there is a big bunch there, if there is a big bunch comes in anybody will remember an especially big bunch.
Q. Can you tell me the number of cattle in any other big bunch of cattle that you tallied as far back as four years?
A. I don't remember of being told to tally any more.
Q. You don't mean to say that that is the only big bunch of cattle that you tallied?

A. Yes sir, I mean to say that is the biggest bunch of cattle I ever tallied I remember anything about.

Q. Well, any bunch, can you tell me the number of cattle in any reasonably sized bunch of cattle you tallied as far back as four years, begin back seven years and tell me the number of cattle you tallied for anybody and whose they were?

A. I don't remember tallying any big bunch.

Q. Well, figure up a little and tell me the number of cattle you tallied for any body four years ago?

A. I don't remember of any that I have tallied up in the last three or four years, unless it is feeders.

Q. Now, go back as far back as two years, begin with two years ago and go back and take in the whole nine years that you have been employed by the Drumm Flato Commission Company, can you tell me the number of head of cattle that you tallied for anybody on any occasion?

A. I know a lot of them I tallied, but don't remember how many there was because they didn't—just merely told me to tally them and turn in the tally or something of that kind.

Q. That is all you were told to do in this case?

A. No sir, I was told to tally and get the counts of all the brands and see they were all correct and everything.

312 Q. Well, getting the numbers of the different brands wouldn't cause you to remember the total number any more, would it?

A. Why, yes, certainly it would. I had two men there with me and we tallied them together and it worked us rather late and we worked hard. We have made a remark about it more than once in the last two or three weeks here; two or three weeks ago it just came up about that big bunch of Edmisson cattle.

Q. Who was there?

A. One of our yard men was there with us, C. F. Shively and Mr. Tarpley.

Q. Do you mean to say because you worked hard tallying those cattle you would be more apt to remember the cattle?

A. No sir, I mean to say that was a large bunch and remember that by the largest bunch.

Q. You hadn't any occasion to carry this in your mind after you had discharged that part of your duty, had you, any more than any other bunch of cattle?

A. Well, I don't know one way whether I did or not.

Q. You never expected to be called upon to tell how many cattle there were in that bunch after you had counted them, had you?

A. No sir, but I was told to see they were correct and see the numbers were right.

Q. Yet you are told that in every case, aren't you?

A. Well, I am told that before anything comes in. I am not told there to separate the bunch, unless they have got a bunch they want tallied, or something, something of that kind, not supposed to do it, not customary to do it unless I would be told to do it; that is how I come to do that.

Q. Was there any other brands on any of these cattle that you have spoken of than the brands you have mentioned?

A. Well, wasn't looking for any other brand than X 2 bars and J. W.'s.

313 Q. I didn't ask you for what brands; I asked you if you found any other?

A. I don't know; wasn't looking for them.

Q. I insist upon you answering my question. Was there any other brands?

A. I suppose there was.

Q. What were they?

A. I couldn't say.

Q. Why do you say they were 55's, 55 bars, J. W.'s and X 2 bar cattle?

A. That is the brand I was told to tally and count; that is all I was looking for.

Q. Can you give me the brands of cattle that were sold by Drumm Flato Commission Company for any other concern as much as four, five years ago?

A. Yes sir, I can give you hundreds of them.

Q. Hundreds of them. How many different brands of cattle do you suppose you have seen there in those yards in the eleven years you have been there?

A. Lord only knows. I have seen lots of them.

Q. What?

A. Hard question to answer.

Q. A thousand.

A. A hundred, might have been two hundred, might have been a thousand, might only have been fifty different brands.

Q. But you know you have seen more than fifty or a hundred?

A. Might have been a hundred; might have been a thousand.

Q. Now who have you talked to recently about this case?

A. Talked to all our folks.

Q. Well, who are all your folks, don't happen to be acquainted with the family.

A. Lampe, have talked to Mr. McClure, didn't talk on the

314 case at all, but just told them my deposition was to be taken up here at Mr. Young's.

Q. Yes, who else?

A. And Mr. Houcks.

Q. Who is he?

A. Feeder buyer; he just asked me where I was at. I told him taking depositions.

Q. You have talked with Mr. Lampe and Mr. Young about it?

A. Yes sir.

Q. And did you and Mr. Lampe talk about the number of cattle that were included in that shipment?

A. Yes sir, I told him I would remember that if I lived to be a hundred years old.

Q. Yes, did he tell you how many there were?

A. No sir, he did not.

Q. Did he say how many there were?
A. No sir, I didn't ask him.
Q. You didn't ask him and he didn't ask you. Did he ask you if you remembered it?
A. I don't know whether he asked me how many there were, but I told him I would remember it.
Q. How did you and Mr. Lampe happen to be talking about it?
A. I told him I was going to give my deposition and he says "You ought to know all about this thing," and I says "I will never forget that if I live to be a hundred years old."
Q. Was that the only conversation you had with him?
A. Well, I don't know.
Q. Where did this conversation take place?
A. Down to the office.
Q. Down to the office?
A. Yes sir.
315 Q. Who was present?
A. I think in the office there was Sharpio and Watters, two bookkeepers was there.
Q. Did they have the books there?
A. No sir.
Q. Didn't have the books there?
A. No sir, they did not.
Q. When did you and Mr. Young talk about it?
A. He spoke about it I think day before yesterday.
Q. Did you and Mr. Young talk about the number of cattle there were, talk about there being 1250 cattle and 243 calves in the first shipment?
A. I think so, I am not sure now whether we did or not but I think we did.
Q. Did the stock yards company's count tally up with your count?
A. Yes sir.
Q. The cattle as they were counted out of the shutes by the stock yards company tallied with your count?
A. Yes sir.
Q. The same number of cattle?
A. Yes sir, if I remember right, they did, because sure something come up if they had not.
Q. If you live a hundred years longer you are not going to forget it?
A. Yes sir, if you asked me a hundred years from now I will tell you all about it.
Q. All right, if I am here I will call around.
A. I hope you will be here, I would like to have you ask me about it.
Q. You say there were three or four cut out of that shipment?
316 A. I think there were three or four by the inspectors and whenever they claim any cattle, of course, they sometimes come to me and say I have a steer belonging to them and then again they take the steers out and I know some times exactly how many

they take out, and then again I don't know until I go up to the office.

Q. You don't have anything to do with weighing the cattle?

A. Not at that time.

Q. And when is it you make your report of the number of cattle?

A. Whenever I go to the office, whenever I can get to the office.

Q. What sort of a memorandum do you make when you count the cattle?

A. Well, I tell him how many.

Q. Tell who?

A. The bookkeeper. Tell him how many, tell him how many we have got for this man and that man so we can check up and so we can tell whether we are short or not or if any got lost during the time they were going to the scales, which sometimes occurs, a calf or a cow or something gets in with another bunch which we don't know.

Q. When do you usually tell the bookkeeper how many?

A. When I go to the office, all the way from noon up to evening, that depends upon how busy I am.

Q. When you go in after the day's work you report to the bookkeeper?

A. I do sometimes.

Q. If you happen to be in the office before you quit for the entire day's work, you report to him?

A. I report to him before I quit sometimes.

Q. That is what I say, if you happen to be in the office?

A. Yes sir.

Q. You say that Bryson and Edmisson were both with that shipment that you first mentioned, the large shipment?

A. I know Mr. Edmisson was there, for I was talking with him.

Q. Was Bryson there?

317 A. I think he was.

Q. How about the second shipment?

A. Well, I don't remember.

Q. You said one of them was there?

A. Well, I don't remember, I think one of them was there, but whether they came with that shipment or not I don't know.

Q. Which one do you think it was?

A. Well, I am pretty sure Mr. Edmisson was still there.

Q. The first shipment?

A. He was in with that. He was in with the first shipment.

Q. You are pretty sure that he was there with the second shipment also?

A. Well, I don't remember whether he was there or not. I think he was.

Q. What do you think about Mr. Bryson?

A. I can't say for sure whether he was there, but I think there was one of them there.

Q. Well, you knew them apart, didn't you, very well?

A. Yes sir.

Q. They don't look anything alike, do they?

A. No sir, I am positive I was talking with Mr. Edmisson.

Q. At that time of the second shipment?
A. No sir, first shipment.
Q. I am talking about the second shipment, now Mr. Rune. That is all.

Here Mr. O. G. Young reads the Re-direct Examination of witness Rune, as follows:—

Q. Mr. Rune, you gave Judge Robinson the average of the number of cars of cattle that were received by the Drumm Flato Com-
318 mission Company per day, did that include all the cattle that were received by them?
A. Yes sir. Of course, I don't know, you know, I don't know the exact count; I never counted.
Q. Well, I know, but you estimated handling about 20 cars a day?
A. Yes sir.
Q. Well, now, how many of these cars would go to the quarantine side?
A. Well, they would average——
Q. (Interrupting.) If there was an average of 20?
A. Well, they would average 7 to 8 cars, perhaps 10.
Q. So you have two stock pens down there in which cattle are sold?
A. Yes sir.
Q. Why is that, Mr. Rune?
A. Well, on account of the quarantine cattle not being allowed on the native side. They have to be bought for immediate slaughter or go beyond the quarantine line.
Q. Cattle sold in the native division can go anywhere in the country?
A. Anywhere, yes sir.
Q. In what division were these cattle?
A. Of Mr. Edmisson?
Q. Yes, where were they unloaded and sold?
A. In the native division, Mr. Edmisson's and Mr. Bryson's.
Q. I understood you to say to Mr. Robinson the reason why you were particular about your recollection as to the number and kind and brands of these cattle was that you had special instructions to count and tally them. From whom did you receive these special instructions?
A. I received it from Mr. Lampe; he gave me special instructions more than once about that drove of cattle.
Q. Did Mr. Edmisson particiapte in the tallying and count-
319 ing of these cattle at that time, that day?

Plaintiff objects to that last question, for the reason that it is leading.

A. He was there.
Q. Do you know whether or not he participated in any way or kept any tally?
A. No sir.
Q. You spoke about some of these cattle being cut out, three or four

head, by the inspectors, were those cattle that were cut out in the brands that you have mentioned?

A. No sir.

Q. As belonging to Edmisson?

A. No sir, they belonged to some other men, whoever they inspected for.

JNO. RUNE.

STATE OF MISSOURI, *County of Jackson, ss:*

I, Genevieve Parlin, notary public within and for the County of Jackson, in the State of Missouri, do hereby certify that the above named John L. Burnett and John Rune, the witnesses whose names are severally subscribed to the foregoing depositions, were by me first duly sworn to testify the truth, the whole truth and nothing but the truth, in the case aforesaid, and that the depositions by them respectively subscribed were reduced to writing by me and subscribed by the respective witnesses in my presence, and the same were commenced on the 3rd day of December, A. D. 1903, between the hours of eight o'clock A. M. and six o'clock p. m. of said day, and same not being completed on that day were adjourned to December 4th, 1903, on which day they were completed, and were taken at the law office of Botsford, Deatherage and Young, 621 New York Life Building, in the City of Kansas City, in the County of Jackson, and state
320 of Missouri, as specified in the notice hereto attached, and that I am not attorney for either of said parties or otherwise interested in the event of said action.

[SEAL.] GENEVIEVE PARLIN,
Notary Public within and for Jackson County, Missouri.

My commission expires February 14, 1905.

Fees: $14.10.
Paid by Defendant.
GENEVIEVE PARLIN,
Notary Public.

Said Exhibit- A and B, attached to said depositions, are in words and figures as follows, to-wit:—

321 EXHIBIT "A," Attached to Deposition.

Drumm Flato Commission Company.

KANSAS CITY, Mo., —— —, 190-.

No. 15656. Account Sales of ——.

Sold Acc't of J. F. Bryson, Curtis, O. T.

Forwarded. Rec'd Dec. 7, 1899, 1200—3367798 102 288

Purchaser-.		Weight.	Price.	Amount.
A D Nam	168 hfs	88110	300	2643.30
"	143 "	74690	300	2238.
"	26 "	13470	300	404.10
A P Co.	119 cws	46880	235	1571.48
"	96 "	53900	235	1266.65
"	28 "	19710	275	542.02
"	26 "	18310	275	503.52
Longsdorf	14 bulls	9310	375	349.12
"	3 "	2780	325	90.35
Doerr	7 cripe cws	.....	5	35.
"	2 top "	1710	100	11.70
	(No good)			
Longsdorf	1 bull	490	375	18.37
Peet	1 cf died in pen	.....	at	1.56
"	1 st "	.....	"	2.00
	634 1 cf	.....	....	9677.31

322 Drumm Flato Commission Company.

No. 15657. Account Sales of ——.

Sold Acc't of J. F. Bryson, Curtis, O. T.

Rec'd Dec. 7, 1899.
For'd..... 634 1 cf 9677.31

Purchaser-	cattle	Weight.		Price	Amount.	
A D H & Mo.	144 hfs	57210		335	1916 53	
o o o	10 "	3976		300	119.10	
o o o	31 "	16280		300	488.40	
Wolf	240 cfs	63860		425	2714.05	
"	2 " no good thrown in	.....		.....		Sep a /s
F P C Irwin	12/8					
J R Gober	1 st	690	t ct ett	34	24.15	net
" "	67 "	50570	—F G,	34	1540,35	a /c
" "	10 avg st	6540	O F	300	196.80	R. F. Denson.
M A Archer	98 sst	41750		360	1503.	J. R. Gober..... $41.73
claimed						24 2
Gober	2 st	1650		360	37.80	ac. E. R. Clauret. 32.70
Hams-Seigils	1 "	630	I G b L I L G	360	22,68	J. F. Bryson..... 1959.27
Swift	9 cws	5720		225	128.70	19671.70
M & A	122 st	51980		360	1871.28	
Harris-Seigels	104 "	59350		360	2136.60	
Do	10 "	5610		300	168.30	
Peet	7 " bad	243		at	13.25	
No. 15689						
2 tp & 1 spring						
back						
	1250				22558.30	

323 EXHIBIT "B," Attached to Deposition.

Drumm Flato Commission Co.

KANSAS CITY, Mo., —— —, 190-.

No. 15669. Account Sales of ——.

Sold Acc't of J. F. Bryson, Curtis, O. T.

Rec'd Dec. 11, 1899. 64.

Purchaser- cattle.	Weight.	Price.	Amount.
Nelson Loudes 17 st	9680	345	333.96
" 2 " avg	1140	300	34.20
" 18 "	7380	345	254.61
Harris 21 hfs	9290	305	283.34
Ruddy 1 hf	400	150	6.00
Ark Nelson K 12/12 4 bulls	2950	345	101.77
Grant-Harris 1 cow spg	880	285	25.08
Settle " 3 "	1520	225	34.42
			1073.38

3 st on this a/s held from 12/7/97
See # 15657
67
67

324 By the COURT: Gentlemen of the Jury: It is now twelve o'clock and we will adjourn this case until half past one. During the adjourned hour, you will remember the admonitions the court has heretofore given you and allow no one to talk to you nor talk to anyone nor talk among yourselves, nor form nor express an opinion in the case until it is finally submitted to you.

Here Court adjourned until half past one o'clock, April 29, 1904, at which time the trial of the above cause was resumed. Jury all present. Counsel for plaintiff and defendant present.

By the COURT: Jury is pres-nt. Proceed, gentlemen.

By Mr. NOAH: J. H. Lampe.

J. H. LAMPE.

J. H. LAMPE, called as a witness on behalf of the defendant in the above entitled cause, being first duly sworn, testified as follows:—

Direct examination by H. A. NOAH:

Q. State your name to the Court and jury?
A. J. H. Lampe.
Q. Where do you live?
A. Kansas City, Missouri.
Q. What is your business?
A. I am selling cattle.
Q. What if any connection have you with the Drumm Flato Live Stock Company?
A. I sell cattle, and I am a stockholder in the company.
Q. Are you acquainted with R. C. Edmisson?
A. I am.

Q. Were you acquainted with him in the fall of 1899?
A. I was.

Q. Call your attention to the time subsequent to November
325 22nd, on or subsequent to November 22nd, 1899, I will ask you if you at that time saw Mr. Edmisson?

A. I did.
Q. About what time?
A. I seen him several times, seen him in September, seen him in October, seen him in November, and seen him in December.
Q. Now, calling your attention to the early part of December, tell the Court and jury when, if at any time, you saw Mr. Edmisson?
A. I saw Mr. Edmisson about the seventh or eight day of December.
Q. Where was that?
A. In our office and in the yards.
Q. What was the occasion of his pres*nece* there, if you know?
A. He and Mr. Bryson came in with a shipment of cattle, two trains of them.
Q. Do you know how many cattle there were in that shipment?
A. Yes sir.
Q. What was the number?

By Mr. SNODDY: Wait a moment, unless it was the number brought through by the cars; we object to this testimony as incompetent, irrelevant and immaterial, as to the number received by this company; can't bind us by it.
Here stenographer reads last question.

By the COURT: Do you know of your own knowledge?
A. The number of cattle we received at Kansas City?

By Mr. SNODDY: That is what I am objecting to, the number received. The evidence shows they were consigned by Bryson at Curtis, and this evidence is for the purpose of binding us upon received by the Drumm Flato Commission Company.
By the COURT: The question is as to how many were in that shipment?

By Mr. SNODDY: Yes sir, he says he knows of his own
326 knowledge, does he?

By the COURT: The question is, do you know how many were in that shipment?
A. Yes sir.
By the COURT: Answer the question.
A. Fifteen hundred and fifty six. Eight dead ones; the balance was alive.
Q. At that time, tell the court and jury whether or not you had any conversation with Mr. Edmisson with regard to this particular shipment of cat-le?
A. Yes sir.
Q. Detail that conversation to the court and jury, please.
A. Mr. Edmisson and Mr. Bryson come in with the cat-le. Mr. Edmisson was with the first train, he was in in the morning. Mr.

Bryson come in with the next train. That morning, Mr. Edmisson come into the office and wanted to have his contract changed, a contract that had been made prior to that. And this was refused him at the time.

By Mr. SNODDY: Now, we object to that, your Honor, as stating his conclusion. We want him to state what was said there.

Q. What Mr. Edmisson said at that time with reference to this shipment of cattle?
A. With regard to this shipment of cattle?
Q. Yes sir?
A. That he and Bryson had brought up this bunch of cattle and that they had the majority of the cattle; there was a few back and that he wanted the contract changed.

By Mr. SWINDALL: We object about the contract?
By the COURT: That is immaterial here, as to any change of contract.

Q. Was that all of the conversation with regard to these cattle?
A. Well, there was some more conversation during the day with regard to the cattle.
327 Q. What if any conversation did you have with Mr. Edmisson on that date with regard to the number of the shipment?
A. Well, the number was mentioned that was in the shipment, but he didn't say anything about it only that he never would have anything left, it busted him. We also talked about——

By Mr. SWINDALL: Wait a minute. You are not asked any more questions. That all?
By Mr. NOAH: Yes sir.

Cross-examination by CHAS. SWINDALL:

Q. You state he said he had the majority of the cattle he had?
A. That they had about all, he wouldn't have anything left, that busted him.
Q. You stated, though, a moment ago that that was the majority of the cattle he had. That his statement?
A. I don't know whether that was his statement; he talked about all the cattle he had, couldn't fill that contract without busting, wouldn't have anything left.
Q. You don't remember exactly what he stated, whether that was the majority of the cattle he had or not?
A. Well, he said there was a very few of them left down there, don't know whether he used—whether the word "majority" was used or not, don't suppose it was.
Q. Do you know how many he said?
A. No, I don't know how many, the ones it left.
Q. Was Mr. Bryson present at that conversation?
A. He made out to me that he had a talk with the Major——
Q. Mr. Bryson?

A. Not Mr. Bryson; Edmisson, I mean?
Q. Well, was Mr. Bryson present?
A. He was in the office, but I don't think he was where
328 he could hear us talk. He might of, but I don't know as to that.
Q. Was anything said there about when you were to come back and get the rest of the cattle that was down there?
A. No sir.
Q. Did he say anything about sending a man back?
A. No sir.
Q. Did you give him any instructions about what to do with the rest of the cattle?
A. He never showed up again, that I seen.
Q. I am still talking about that time?
A. There wasn't anything said about sending anyone back, because they had reported there was nothing much to get.
Q. You told him how many cattle come in on that train, did you?
A. Yes.
Q. Stated how many cattle come in on that train, how many cattle the shute count was at that time?
A. Yes sir.
Q. Did you tell him that yourself?
A. Yes, I think I did. I think I got the information, though, from one of the yard men.
Q. I am not asking you for what you learned but I am asking what you know.
By the COURT: Did you say all the information you had of the number of cattle you got from the yards?
A. From the shute count.
By the COURT: Sir?
A. From the shute count, yes sir.
By the COURT: You got it from somebody else?
A. I got it from our yardman.
By the COURT: I put the question to you, did I not, that
329 you might answer as to how many cattle there were, if you knew of your own knowledge? You know what that means?
A. We take it for granted whenever they count them, that the shute count is the number of cattle.
Q. And you taken the shute count as your own knowledge, do you?
A. As soon as a train of cattle is unloaded——
Q. I am not asking you that; I am asking if you take the shute count as your own knowledge?
A. Yes sir.
Q. What somebody else tells you?
A. Yes, they count them. I don't know but that——
By Mr. SNODDY: We ask to have all of it withdrawn.
By the COURT: It will be withdrawn from the consideration of the jury, the statements of this witness as to how many cattle there were, as hearsay.
A. I didn't count them myself.

Q. You say you didn't see Mr. Edmisson there any more that day?
A. Yes, out in the yards.
Q. You didn't in the office any more that day?
A. Well, I may have.
Q. Now, don't you know that Johnny Rune, that it took Johnny Rune that day, all that day to count those cattle, and the complete count wasn't made at that time, that he stayed there and worked there all day, and didn't get his dinner?
A. That is right?
By the COURT: You ought not to cross examine him on that, except on some proposition brought out in chief.
Q. You say you are a stockholder in the company?
A. Yes sir.

330 By Mr. SWINDALL: That's all.
By Mr. NOAH: I would like to put Mr. Edmisson on the stand.
By Mr. SWINDALL: You will make him your own witness?
By Mr. NOAH: Of course we expect to make him our own witness.
Witness excused from the stand.

R. C. EDMISSON.

R. C. EDMISSON, called as a witness on behalf of the defendant, having previously been sworn, testified as follows:

Direct examination by H. A. NOAH:

Q. You are the plaintiff in this case, are you not, Mr. Edmisson?
A. Yes sir.
Q. You made a trip from Curtis to Kansas City with the first train load of these cattle, shipped about the first of December, '99?
A. Yes sir.
Q. Do you know whether or not any of those cattle got away on the road up there?
A. From Curtis to Kansas City?
Q. From Curtis to Kansas City.
A. No sir, I don't know that any got away on the road.
Q. You were with that train?
A. I was with the first train.
Q. And would have known if any did get away?
A. Well, no, they might of got away, might of cut off a car or two for all I know.
Q. Then you don't know whether they all got there or not?
A. No, I don't.

Cross-examination by CHAS. SWINDALL:

Mr. Edmisson, were the cattle that were taken after you delivered this seventeen hundred and ten you spoke of——

331 By the COURT: That is not cross examination on anything brought out in chief of this witness. You must observe some

of the rules, gentlemen. Stand aside, unless you want to ask something about what they have brought out.

Witness excused from the stand.

By Mr. NOAH: We want to recall Mr. Bryson, but it seems we can't get him. Call Mr. Young.

O. G. YOUNG.

O. G. YOUNG, called as a witness on behalf of the defendant in the above entitled cause, being first duly sworn, testified as follows:—

Direct examination by H. A. NOAH:

Q. State your name to the Court and jury.

A. O. G. Young.

Q. Where were you in the latter part of July or the early part of August, 1900?

A. 1900?

Q. Yes sir.

A. Well, I couldn't hardly tell. I was at Woodward part of the time and I was out on the range, Mr. Gober's range part of the time.

Q. About what time was that that you were at Goeber's ranch?

A. Well, we went out there, my recollection is, somewhere between the first and tenth of August. I don't know just exactly the date, and I haven't refreshed my mind about the time.

Q. Between the first and tenth of August, 1900?

A. Yes sir.

Q. What if any business did you transact at that time?

A. Well, the Company, Drumm Flato Commission Com-
332 pany, sent me down here to tally the cows, cattle, that Mr. Gober had gathered of this Edmisson brand, instructed me to tally the cattle and turn them over to Mr. Gober.

Q. Did you tally them?

A. Yes sir we went out there on one day and rounded up the pasture the next morning quite early, and cut a number——

By Mr. SNODDY: Now, your Honor, we want to have an opportunity to object. I was waiting to see how far this testimony was going. I don't think it is relevant or material at all. It was in the absence of Mr. Edmisson and a long time after they were taken possession of, into the possession of Mr. Gober. This was about the tenth of August, and these cattle were taken away a short time after the shipment was made in December.

By the COURT: I do not know what he is going to make out of it.

By Mr. SNODDY: He asked him about the tally.

By the COURT: That is answered. I supposed that was preliminary, however. I didn't know what was coming.

Q. Tell the court and jury how many of the Edmisson brands you found on the Gober ranch at that time.

A. Found——

By Mr. SNODDY: Wait. Now, we object to that as incompetent, irrelevant and immaterial. This was long after Gober had them in

his possession, long after he had them in his possession by the authority and permission of the defendant in this case, long after that time, several months afterwards, and they were taken from the pasture in the absence of Mr. Edmisson who knew nothing about it; that they were taken by Mr. Gober, and this was long about the tenth of August that he takes a tally of what Gober claimed was all the Edmisson cattle. Entirely too remote. Don't tend to prove anything. And it is an attempt to introduce the acts of the de-
333 fendant here himself in his own favor.

By the COURT: I think it is competent. The weight of the testimony, however, will be for the jury. It is competent if for no other purpose than to show that he got that many cattle.

By Mr. SNODDY: We could introduce it for the purpose, for that purpose. It is their acts, and by those acts they seek——

By the COURT: I understand, but it shows a certain number of cattle, whether it shows all or not, is for the jury.

By Mr. SNODDY: I understand that. We have got their testimony on that question, but can they show their own acts in their own favor, in our absence, to prove the number of cattle they had there. They are putting that on for the purpose of showing that is all the cattle Mr. Edmisson had.

By the COURT: If it shows that it is competent. If it tends to show that, it is competent.

By Mr. SNODDY: If Mr. Edmisson was present, there would be no question about it.

By the COURT: Present or not, it is something from which the jury can find out how many cattle they did get, and if so, of course, it would be competent. It is certainly competent to some extent, but the weight of the testimony, what credit and what weight is to be given to it, that, of course, is for the jury and not for the Court.

By Mr. SNODDY: It is conceded that Gober had a number of these cattle. Now, they propose to show——

By the COURT: They concede he had a number but deny they had the number you claim.

By Mr. SNODDY: But remember that for months before this time they were out of our possession.

By the COURT: That is true, but that is a circumstance the jury must take into consideration when they get the case. I think
334 this is competent. I think this evidence is competent.

By Mr. SNODDY: The plaintiff excepts.

A. Read the question, please, Mr.——

Here the stenographer reads the last preceding question to witness.

A. Two hundred and ten head.

Q. Tell the court and jury whether or not the Gober range was rounded up for the purpose of finding out how many cattle there were there of the Edmisson brand?

By Mr. SWINDALL: Objected to as leading.

By Mr. SNODDY: Objected to as incompetent, irrelevant and immaterial.

By the COURT: One at a time, gentlemen. One objection is sufficient. It is leading.

By Mr. SNODDY: I waited for them to finish it, I wanted to adopt an amendment——

By the COURT: Wait a minute. The Court has held it is leading.

Q. Tell the court and jury what was done there at that time before those cattle were counted?

A. The pasture——

By Mr. SNODDY: Wait a moment. Objected to as incompetent, irrelevant and immaterial and hearsay, and not a part of the *res gestæ*, too remote in time from the time that they were taken from the possession of Mr. Edmisson.

By the COURT: The witness may answer if he knows.

A. Yes sir, that is, I know what I did and helped to do. We rounded up the pasture very thoroughly. There was some, probably ten or twelve hands gathered or notified the evening before that they were going to round up that pasture, notified by Mr. Gober, and the pasture was rounded up the next day very thoroughly.

335 By Mr. SNODDY: Now, your Honor, there is a great deal of this hearsay, and it comes from a party especially interested, comes from Gober himself. It seems to me this witness didn't round up that pasture himself.

By the COURT: He says he helped to.

By Mr. SNODDY: I don't understand this witness pretends he rounded up this whole pasture himself, or personally knows what these other men did.

By the COURT: Proceed gentlemen.

By Mr. SNODDY: And Gober was buying the cattle from the company at the time.

By the COURT: Oh, that only effects the weight of the testimony. It does not effect its competency.

By Mr. SNODDY: The witness don't claim personally to know that that pasture was rounded up, says that Mr. Gober got a number of men.

By Mr. NOAH: He says he helped them.

By Mr. SNODDY: He says he helped but he don't say he was with them. I think Mr. Young is probably commander in chief, the boss of the job.

By the COURT: Answer the question.

Here the stenographer reads the last preceding answer of the witness.

A. Well, I would say further these men were there the next day, the men, the neighbors from adjoining ranches, I suppose, I didn't know the men, they were strangers to me, but the pasture was rounded up as they usually round them up. I myself took it upon myself to make myself a cowboy and rode with them all the forenoon and helped to cut the cattle out and count the cattle after they were cut out.

Q. Tell the court and jury whether or not the two hundred and

ten head you mentioned comprised all the cattle in the Edmis-
336 son brand in that pasture at that time.

By Mr. SNODDY: Objected to as incompetent, irrelevant and immaterial.

A. Yes sir, that was——

By the COURT: Answer the question.

A. That was all the cattle that were in those brands. There was a lot of other cattle in there, possibly five or six hundred head. I didn't count them, any other brands.

By Mr. NOAH: Cross examine.

Cross-examination by CHARLES SWINDALL:

Q. Was the Gober pasture the only one you rounded up, Mr. Young?

A. The only one I was in, yes.

Q. At that time did you sell Mr. Gober the two hundred and ten head of cattle or did you sell him the remainder of the Edmisson brand?

A. I sold him the two hundred and ten head, the remainder wasn't sold to him at all, just the two hundred and ten head of cattle.

Q. What time was this you were out there?

A. Well, it was somewhere between the first and the tenth of August, 1900.

Q. First to the tenth of August?

A. Yes sir.

Q. I believe you stated you- name is O. G. Young?

A. Yes sir.

Q. Are you a stockholder in the Drumm Flato Commission Company?

A. Yes sir.

Q. Attorney for the company also?

A. Yes sir.

Q. Did you participate in the trial of the Edmisson case on the former hearing in this court about April, 1901?

A. Yes sir.

Q. I will get you to state if in your opening statement to
337 the jury at that time you used the following language: "O. G. Young made a statement to the jury, in which opening statement said O. G. Young stated that the company, through its president, A. Drumm, had practiced a deception upon R. C. Edmisson and had only entered into the contract of November 22, 1899 with R. C. Edmisson to get control and possession of said cattle."

A. That I made such a statement as that?

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial. Not purporting to be Mr. Young's statement.

By Mr. SWINDALL: We know it is.

By Mr. SNODDY: It purports to be his undoubtedly.

By Mr. NOAH: Well, we are objecting, now; it does not purport to be O. G. Young's statement.

By Mr. SNODDY: That was in line with the defence made in the case, if your Honor please——

By the COURT: Proceed, gentlemen.

Q. That is all the cattle you have any personal knowledge of was the two hundred and ten head you saw, was it, Mr. Young?

A. Yes sir.

Q. Had you ever acted as a cow boy before?

A. Yes sir, that has been my former business, raised on a farm, and I expect I——

Q. How long has it been since you followed the cow business up to the time you went out there this time?

A. Well, sir, I am in the cattle business now, my brother and I. My profession, however, is practicing law.

Q. How long have you been practicing law?

A. Something like nineteen years.

Q. You have been devoting your attention to that instead of the cattle business, haven't you?

338 A. Well, I have had considerable to do with the cat-le business, a good deal more than I now have any pleasure over.

Q. That is all. Do you know whether any cattle were shipped out of there by Mr. Gober after he received them?

A. After Mr. Gober received the cattle?

Q. Of Edmisson, yes sir? I say, do you know how many cattle were shipped out by him to Kansas City?

A. No sir.

Q. Do you know that he shipped any?

A. Not to my personal knowledge.

By Mr. SWINDALL: That is all, Mr. Young.

Witness Excused from the stand.

J. F. BRYSON.

J. F. BRYSON, recalled as a witness on behalf of the defendant, testified as follows:—

Direct examination by Mr. NOAH:

Q. Mr. Bryson, you told the jury that you went to Kansas City?

A. What?

Q. I will have to get nearer, I thought may be I could carry that far. You told the jury you went to Kansas City with the train load of cattle somewhere about the first of December, 1899, with these Edmisson cattle, you went with that train personally, didn't you? In the first or second train?

A. I went with both shipments that was made, the nineteen——

Q. No sir, I am alluding to the second train load of the large shipment?

A. Yes, I went down with the second train load, or second shipment.

Q. Did any of those cattle get away from you on the road to Kansas City?

339 A. On the road to Kansas City there were two car loads taken off here.

Q. Two car loads taken off here?

A. Yes sir.

Q. How many of those two car loads were taken, if you know?

A. About sixty five or seventy head, somewhere along there, I couldn't say the exact number.

Q. Those were all that got away from you on the way up there, were they?

A. Yes sir.

By Mr. NOAH: That is all.

Cross-examination by CHAS. SWINDALL:

Q. Were they afterwards shipped on to Kansas City, Mr. Bryson?

A. Those cattle?

Q. Yes sir.

A. Why, yes sir, those were the orders.

Q. I am not asking to be inquisitive, or anything that way, but was your hearing as bad at that time, Mr. Bryson, as it is now?

A. No sir.

By Mr. NOAH: The defendant rests. Just one moment, if the court please. We wish to offer the notes and mortgages in evidence. where are the notes and mortgages. Have you the papers.

By Mr. SWINDALL: No sir. We object to it as incompetent, irrelevant and immaterial.

By Mr. SNODDY: And for the further reason, as I understand, there has been a suit brought upon these notes for the balance and the case tried and a judgment in favor of the plaintiff in this action.

By ERSKINE SNODDY: Plaintiff in this action?

By Mr. SNODDY: Plaintiff in this action, a suit they had
340 at Kansas City. I say, the suit was brought at Kansas City, and a decision rendered in favor of the plaintiff, Mr. Edmisson. The case was tried at Liberty.

By the COURT: I want to ask Mr. Bryson some questions myself, to see that I am right.

J. F. BRYSON, recalled, testified as follows:—

Examination by the COURT:

Q. I believe you stated that you arrived in Kansas City with fifteen hundred and fifty six head of cattle, in those two train loads?

A. No sir, I didn't get in with that many, because there was two car loads taken from here that didn't get to Kansas City until after I left there. Two car loads taken here for taxes.

By the COURT: That is all.

Witness excused from the stand.

By Mr. NOAH: Now, if the Court please, I want to offer in evidence——

By the COURT: Let me understand. I understand that your evi-

dence shows that the count on these cattle in Kansas City by these different witnesses showed fifteen hundred and fifty six head. In no place in the testimony do you say it includes these sixty five or seventy head.

By Mr. YOUNG: Yes, your Honor.

By the COURT: All the witnesses seemed to be testifying of the two train loads that were shipped at that one time.

By Mr. YOUNG: Mr. Rune's testimony, your Honor was that there was two train loads come in and then two or three days later two car loads came in of sixty seven cattle. Made a total of fifteen hundred and fifty six.

By the COURT: I did not so understand it. I would like to refer back to it and see in order that I may get in in my instructions.

341 By Mr. NOAH: Now the defendant offers in evidence, to introduce in evidence the mortgages attached to the amended answer and marked Exhibits A. and D, and the notes secured by those mortgages.

Which said mortgages are marked Exhibit C and D by the stenographer.

By Mr. SWINDALL: That is objected to as incompetent, irrelevant and immaterial under the issues in this case.

By Mr. SNODDY: I have a further objection to offer if that is not sufficient.

By the COURT: Make all your objection now, gentlemen, if you wish.

By Mr. SNODDY: Well, I can't imagine the object they have in offering it, under the issues in this case. It would not be a defense to an action of this kind under our statute, it would not be any defense if they had stated they had taken the cattle and applied them, under our peculiar statute. That under the issues made by the pleadings, that could not be——

By the COURT: For what purpose is this competent?

By Mr. SWINDALL: I desire to make a further objection to it, for the reason that the contract dated November 22, 1899, is a subsequent and binding agreement upon these parties, and any evidence as to these two mortgages is incompetent, irrelevant and immaterial to any issues in this case.

By the COURT: Well, that is just a repetition.

By Mr. SWINDALL: He didn't state about the contract.

By Mr. SNODDY: That was a matter before the court.

By Mr. NOAH: I think they are competent if the court please, on the theory that the contract of December 22, 1899, was abrogated by the failure to deliver the cattle, put upon us the burden of hunting for and gathering them ourselves.

342 By Mr. SNODDY: They must stand by one defense or the other. I want to call your Honor's attention to our statute in cases of this sort.

By the COURT: I will hear you now.

By Mr. SNODDY: I just simply want to call your Honor's attention

to this sort of an action, that they, if they took our property and applied it upon our indebtedness, cannot make that an answer. The detriment caused by the wrongful conversion of personal property is presumed to be, first, the value of the property at the time of the conversion, with interest from that time, second, where the action has been prosecuted with reasonable diligence, the highest market value of the property between the time of the conversion and the recovery, and third, the time and money spent in pursuit of the property. A subsequent application to the benefit of the owner is not a defense so it can not be offered in mitigation in this case.

By the COURT: What section is that?

By Mr. SNODDY: Running section 2640, that is the only reason I can think of they would attempt to offer it in testimony in this case. 2640.

By the COURT: We will take a recess for a few minutes. I am inclined to think this is not competent except to be a matter preliminary, carrying out the allegations of the petition that there was a mortgage and that the terms of the mortgage have been abrogated by the new contract. Of course, the mortgage is a part of the petition, or part of the answer. In one sense, pleadings are always in evidence, not in the sense in which it is offered here. Gentlemen of the Jury: We will take a ten minutes recess. During the time you are out, you will remember the admonitions the Court has heretofore given you.

By Mr. SNODDY: I want to call your Honor's attention to another matter. We allege conversion under that contract. They must rescind the contract or rely upon it, or else they can't come in here——

By the COURT: I am for you on that proposition. I have
343 stated it two or three times.

Here the Court took a recess for ten minutes. After recess the trial of the above cause was resumed. Jury all present. Counsel for plaintiff and defendant present.

By the COURT: Mr. Young, I understand from the pleadings and the evidence or rather from the evidence in this case, at this time, that you got this first shipment of two train loads, whatever the number may be, and went down there and gathered them under this contract. Is that correct?

By Mr. YOUNG: Well, I don't hardly think it is according to the evidence. We went down there to get them under this contract, but had to go and gather the cattle ourselves.

By the COURT: Well, but what I mean, the gathering of those cattle was all by virtue of the contract, as set up in the pleadings, whether the terms of it were carried out or not.

By Mr. YOUNG: They were to be delivered to us, but they were not delivered to us, so we just went and gathered them.

By Mr. SNODDY: The evidence is all one way on that proposition.

By the COURT: What?

By Mr. SNODDY: The evidence is all one way on that proposition.

By Mr. SWINDALL: Mr. Bryson states he went there to get these cattle under the contract.

By Mr. SNODDY: Yes sir, he stated he had instructions to get the cattle under the contract.

By Mr. YOUNG: He stated he went down there to receive the cattle, and when he got there, the cattle were scattered and he had to hire men to gather them at his own expense. Those are the facts.

By Mr. SNODDY: The testimony of Mr. Bryson—Mr. Edmisson I think it was,—no Mr. Bryson, that he went down there to get the cattle under the contract.

344 By Mr. YOUNG: And he writes a letter as your Honor remembers, and it was stated in the testimony that the contract didn't provide that whatever number he had remaining, as was the agreement, he was to have his paper on. That was his contention.

By Mr. SNODDY: That was after the cattle was shipped.

By the COURT: No, I think it was before.

By Mr. SNODDY: Well, I didn't so understand it.

By Mr. YOUNG: Our contention is he didn't carry out the contract by delivering the cattle to us under the contract.

By the COURT: I understand that.

By Mr. SNODDY: He makes no complaint about it when he went down there, doesn't claim Mr. Edmisson didn't fill him contract at that time.

By the COURT: It is a little difficult for the Court to determine in this case some of the matters, because of the condition of the pleadings. The plaintiff sets up the mortgage or mortgages as a sort of inducement, seemingly, for the making of the subsequent contract of sale. The defendant denies the conversion and sets up the fact that they had the mortgages and sets up the fact that they took the cattle under the mortgages. Admits the execution of the contract, and claims it was without consideration, the conditions were never performed. The burden is upon the question of consideration, as treated in the answer, and evidently treated all the way through the former trial as being without consideration, and I suppose the Court must have held it without consideration.

By Mr. SNODDY: Yes sir.

By the COURT: The Supreme Court, however, has held the contract valid and that there was sufficient consideration. Now, there is no change in the pleadings, but we are trying the case upon the same pleadings we tried it on before. Now, what are the results? They admit they took the cattle, but claim they took them under

345 the mortgage, because the contract was void. In other words, they try to avoid the contract on the theory it was void and they are not bound by it; that is, they admit taking a certain number of cattle. I think I shall admit the mortgages and control the matter by the instructions.

By Mr. SWINDALL: We desire to except. Your Honor, as far as the execution of the mortgage and notes goes, that is not denied, the Supreme Court held that, because the reply is not verified. Therefore we don't deny the execution of the notes and mortgages.

By the COURT: Well, I understand that. I understand you do not deny the execution of the notes and mortgages.

By Mr. SNODDY: Under the decision of the Supreme Court, the only matter left to be determined was whether or not the plaintiff had been damaged by the wrongful conversion of the property; that was the only matter in the mandate of the Supreme Court.

By the COURT: Let me have that decision. I read it once but I do not have it in mind at this time.

By Mr. SNODDY: If the Court would hold that material in this case, we would have a right to amend the reply at this time to show that that matter has all been litigated.

By the COURT: You have not done it, gentlemen. If there has been a judgment you should have set it up.

By Mr. SNODDY: We are trying this case on the question that was submitted——

By the COURT: If there has been a judgment under this mortgage, it is *res adjudicata.*

By Mr. YOUNG: There is no final judgment.

By Mr. SNODDY: I understood the other side had appealed from it so it must have been final.

346 By Mr. YOUNG: That is the very reason it is not final.

By Mr. SNODDY: Why, I only understood you could only appeal from a final judgment.

By Mr. YOUNG: We are not asking for a judgment over in this case at all, in this answer.

By Mr. SNODDY: This same matter, I understand, has been litigated, the same notes and the same mortgages.

By the COURT: The Court will allow the mortgages to be introduced.

By Mr. SWINDALL: We desire to except to the ruling of the Court.

By Mr. NOAH: (Reading.) "Exhibit A."——

By Mr. SNODDY: I presume they are in evidence without reading them.

By Mr. NOAH: Well, they will have to be read some time. Exhibit A, which is stenographer's "Exhibit D," chattel mortgage, is as follows:—

Here Mr. Noah reads Exhibit D to the jury, which said Exhibit "D" is in words and figures as follows, to wit:—

Chattel Mortgage.

Know all men by these presents, that R. C. Edmisson, of Woods County, Oklahoma Territory, party of the first part, in consideration of the sum of Thirty Seven Thousand Three Hundred and Seven 92/100 Dollars, to him paid by the Drumm-Flato Commission Company, a corporation, party of the second part, the receipt whereof is hereby acknowledged, ha— bargained, sold, assigned and transferred, and by these presents do— bargain, sell, assign, and transfer unto said party of the second part and its successors and assigns, all the following articles of personal property, situated in Woods County, Okla. Territory, to wit:

All of his stock of cattle branded *X 2* on left hip and 2 on
347 left jaw, comprising (3340) thirty three Hundred and forty head and consist of about the following classes, and ages:
(1500) Fifteen hundred head of cows three years old and up;
(55) Fifty five head bulls, one year old and up;
(300) Three hundred head two and three year old steers;
(300) Three hundred head one year old past steers;
(495) Four Hundred and ninety five 1, 2 and 3 year old heifers;
(700) Seven hundred head calves, mixed steers and heifers worth now $66,800.

Said cattle are now located in the mortgagor's pasture on the North Canadian River, about twenty five miles S. E. of the town of Curtis, in Woods County, Oklahoma Territory, where the same are being fed on corn, kaffir corn, sorghum and hay, and being all the property of the above description owned or controlled by the mortgagor now on said premises, and this mortgage is intended to cover and include all of said property of the above description and any addition and increase thereto located on the above described premises and range, if any, thereabouts. The marks and brands used above to describe said property are the holding marks and brands and carry the title, although said property may have other marks and brands. If the mortgagor should desire to mix any other property with the above, before doing so he shall give a full description of said property intended to be so mixed, with the name of the owner thereof to said second party, and obtain the written consent of said second party before mixing the same.

This mortgage shall also cover and include all the right, title and interest of the mortgagor in and to the pasturage, feed pens, feed troughs and water privileges used in feeding said live stock. Said property to remain and be kept on the premises above described until
the full payment of the indebtedness hereinafter described,
348 unless marketed or removed by and with the written consent of the mortgagee or its assigns. When marketed, said cattle are to be shipped and consigned for sale to Drumm-Flato Commission Company, at the stock yards at Kansas City and when sold, the proceeds thereof shall be applied first in payment of the usual and customary commissions to said Drumm-Flato Commission Company for selling same, and the balance or so much thereof as may be necessary, shall be applied on the indebtedness hereinafter described. If said cattle, or any part thereof be consigned or sold elsewhere than above, then said mortgagee shall be paid a commission of 50 cents per head on all the above described cattle.

Provided always, and these presents are upon this express condition, that if said party of the first part shall pay or cause to be paid unto the said party of the second part, its successors and assigns, the commissions heretofore stated and agreed upon and the aforesaid sum of Thirty Seven thousand three hundred and seven 92/100 dollars ($37,307.92) according to the terms of five certain promissory note- hereinafter described, executed by R. C. Edmisson, to the order of Drumm-Flato Commission Company, and payable as follows:—

One note for $9375.00, dated Nov. 9, 1898, payable May 11th, 1899, after date.

One note for $7858.26, dated Dec. 19, 1898, payable June 19th, 1899, after date.

One note for $7000.00, dated Dec. 19, 1898, payable June 19th, 1899, after date.

One note for $7000.00, dated Dec. 19, 1898, payable June 19th, 1899, after date.

One note for $6074.66, dated Dec. 19, 1898, payable June 19th, 1899, after date.

All payable at the office of said Drumm-Flato Commission Company, Kansas City, and all with interest thereon at the rate of 8 per cent., per annum from maturity or according to the terms of any renewal or extension of said note which may be made by consent of said second party, its successors or assigns, and may be evidenced by the execution of new note or notes in place of said original note at or after maturity, for the amount of the debt then unpaid and payable hereunder, and for which this mortgage is and shall be a continuing security until paid, whether said debt be evidence- by said original note above described or any renewals or extensions thereof, and which said notes the party of the first part hereby agree to pay on the maturity thereof, then these presents and everything herein contained shall be void, anything herein contained to the contrary notwithstanding. And it is hereby mutually covenanted and agreed between the parties hereto, that if default be made in payment of said sum of money, or any part thereof or the interest thereon, according to the tenor and effect of said note, when the same becomes due and payable, or upon a failure to conform to or comply with any of the conditions and agreements herein mentioned, then the whole sum of money hereby secured shall, at the option of the party of the second part or the legal holder or holders of said note or notes, become due and payable at once, without notice. And it is further agreed that in case of sale or disposal or attempt to sell or dispose of the goods and chattels hereby mortgaged, or a removal of, or attempt to remove, the same from the premises aforesaid, or an unreasonable depreciation in value, or if from any other cause the security shall become inadequate, or the party of the second part shall deem itself insecure at any time before said indebtedness is fully paid, whether the same be due or not, then and thenceforth it shall be lawful for the said party of the second part, its successors or assigns or its authorized agent, to enter upon the premises of the said party of the first part, or any other place or places wherein said goods and chattels or live stock aforesaid may be, to remove and dispose of the same as aforesaid without resort to law, and without appraisement or notice (all right of redemption, appraisement and notice of foreclosure required by law being hereby expressingly waived), and all the equity of redemption of the said party of the first part, at public auction or private sale, to the person or persons who shall pay the highest price for the same, and out of the avails thereof to retain the full amount of said obligation, with the interest thereon, according to the conditions thereof, together

with all reasonable costs and expenses attending the same and commissions aforesaid, rendering to said party of the first part or his legal representatives, the surplus money, if any there shall be, anything herein to the contrary notwithstanding. And until default be made, as aforesaid, or until such time as the said party of the second part shall deem itself insecure, as aforesaid, the said party of the first part to *to* continue in the peaceable possession of all said goods and chattels, all of which in consideration thereof he agrees shall be kept in as good condition as the same now are, and taken care of at his own proper cost and expense; and upon the neglect or failure of said first party so to do, then said second party, its successors or assigns, may cause the same to be done, and for all expenses so incurred and sums expended, this obligation shall be a continuing security; and if from any cause said property shall fail to satisfy said debt and interest aforesaid, said party of the first party hereby agrees to pay the deficiency on demand.

In witness whereof, the party of the first part has hereunto set his hand and seal this 19th day of December, in the year of
351 our Lord one thousand eight hundred and ninety eight.

R. C. EDMISSON.

Signed, dealed and delivered in the presence of
F. W. FLATO.
R. WATERS.

STATE OF KANSAS, *County of Wyandotte, ss:*

Be it remembered, that on this 19th day of December, A. D. 1898, before the undersigned, a notary public duly commissioned and acting as such within and for the county of Wyandotte aforesaid, personally came R. C. Edmisson, to me well known to be the grantor described in and who executed and whose name is subscribed to the foregoing instrument of writing as party thereto, and stated and acknowledged to me that he executed the same as his free act and deed for the purposes and considerations therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Kansas City, in said county, the day and year first above written.

My term of office as notary public will expire March 28, 1902.

JAMES RATCLIFFE,
Notary Public.

Affidavit of Ownership.

STATE OF KANSAS, *County of Wyandotte, ss:*

To obtain credit for the within amount, R. C. Edmisson, being duly sworn, upon his oath, says that the property, in number and kind as designated in the within instrument, is now located at the place or places stated in this instrument, and that the mortgagor herein is the lawful and absolute owner of said property described

that he has full power and authority to sell or mortgage the same and give clear title thereto, and that there are no liens or mortgages against said property.

R. C. EDMISSON.

352 Subscribed and sworn to before me this 19th day of Dec., 1898.

JAMES RATCLIFFE,
Notary Public.

Endorsed on back: Exhibit D. No. 2987.
Chattel Mortgage from R. C. Edmisson to Drumm Flato Commission Company.
A copy of this instrument was filed for record on the 23rd day of Dec., A. D. 1898, at three o'clock P. M., and duly recorded in Book 3, of E at page —.

J. W. MOORE,
Register of Deeds.

TERRITORY OF OKLAHOMA, *County of Woods, ss:*

I, G. P. Green, Register of Deeds in and for said county, hereby certify that the within is a true copy of a chattel mortgage filed in my office at Alva, Oklahoma Territory, Dec. 23, 1892, and recorded in Book 3 at page E.

C. P. GREEN,
Register of Deeds.

Here Mr. Noah reads Exhibit B.
By Mr. SNODDY: I haven't seen them, but I am informed that this answer, this last answer was filed in November, about a year after the time these cattle were taken on these notes offered in evidence, there is no endorsements on these notes of receiving any amount on them whatever.
By the COURT: You admit making the mortgages?
By Mr. SNODDY: Most assuredly.
By the COURT: That is all the Court is deciding now.
By Mr. NOAH: Exhibit B. No, Exhibit C. It reads——
By the COURT: It is hardly necessary to read that. They
353 are exact duplicates.
By Mr. NOAH: These mortgages are alike. It is made on the 19th day of December, 1898, for $20,367.16, covering all of his stock of cattle, comprising 2170 head, branded in one or more of the following brands, 55 bar, 55, left jaw, J. W., either side,——
By the COURT: It is conceded these mortgages are on these cattle. It is unnecessary to read all of this. The court will not allow the notes to be introduced in evidence if there is any objection to them, because they are the indebtedness, and for the purpose here, I cannot see they would be of any material value.
By Mr. SWINDALL: Objected to as incompetent, irrelevant and immaterial to any material issue in this case, and also they are in-

troducing two sets of notes, one is the original note and the other a collateral note securing it.

By ERSKINE SNODDY: One is the original note and the other was given in renewal.

By the COURT: Is that true of the mortgages?

By ERSKINE SNODDY: Yes sir.

By the COURT: They claim one of the notes and mortgages is a renewal of this one.

By Mr. NOAH: Well, I submit them to the Court.

By Mr. YOUNG: The original notes that are described in the mortgage are the ones, the original notes are pinned together with the renewal, that is all there is to that.

By the COURT: The notes mentioned in the mortgage would be the only ones that would be valid here at all, so far as the purposes of this case go, but the court thinks the notes become immaterial here.

By Mr. SWINDALL: We object to the introduction of the notes because they are incompetent, irrelevant and immaterial to any issue in this case.

354 By the COURT: The court held a moment ago so far as I could see now there is nothing about these notes that would have any weight or be competent or material here, except as shown by the mortgages.

By Mr. SNODDY: Your Honor, you understood there had been no payments made upon these notes.

By the COURT: I say, the notes have not been paid, except by this process through the contract.

By Mr. SNODDY: They have introduced two mortgages and those cover other cattle entirely, not having anything to do with this contract.

By Mr. YOUNG: There are two mortgages. One mortgage covers the X 2 bar cattle and secures thirty seven thousand dollars, and the other mortgage covers the 55 and J. W. cattle and secures twenty thousand dollars.

By the COURT: Which are the four hundred head sued for.

By Mr. YOUNG: We don't know; they just say four hundred head of cattle. The contract was supposed, if it was carried out, to wipe out the indebtedness, the two mortgages.

By the COURT: Yes sir, that is as I understand it.

By Mr. YOUNG: But there is no double mortgage.

By the COURT: There are no notes spoken of in these pleadings, are there?

By Mr. YOUNG: The notes are set up in the answer.

By the COURT: I do not see them.

By Mr. YOUNG: Together with a statement here, showing exactly the number of cattle and the price the cattle brought, in this pleading.

By the COURT: I mean, set up here in an exhibit. Of course you allege these facts to exist. Where is your reply to this?

355 By Mr. SNODDY: I think the reply simply covered the contract. There has never been any claim on our part of anything else.

By the COURT: The court allows the mortgages to be introduced in evidence or read in evidence largely through the fact that they are set up as exhibits and admitted in the pleadings; that is one of the main inducements of the court here to allow them to be offered in evidence. Let me see that answer. Is this the third amended answer?

By Mr. SNODDY: No sir, the second amended answer.

By Mr. NOAH: That is the one the case is tried on.

By Mr. SWINDALL: It should be the third answer.

By Mr. NOAH: This slip was introduced and then they made a reply after that slip was introduced by agreement and order of the court.

By the COURT: I don't see anything in here of any value except a general denial, denying the fact you did not receive them under the mortgage, and that would not make these notes competent. There is no denial of the indebtedness. There is an admission of the indebtedness all the way through; in fact, they plead it in the first place in the petition, unnecessarily, too. There is no reason to introduce the notes.

By Mr. SWINDALL: We never did deny we were indebted to them; we claim this contract was a new agreement, a subsequent contract.

Said second chattel mortgage, marked Exhibit C, is in words and figures as follows, to wit:—

Chattel Mortgage.

Know all men by these presents, that R. C. Edmisson, of Woods County, Oklahoma Territory, party of the first part, in consideration of the sum of Twenty Thousand Three hundred and sixty seven 16/100 dollars, to him paid by the Drumm Flato Commission Company, a corporation, party of the second part, the receipt whereof is hereby acknowledged, has bargained, sold, assigned and
356 transferred, and by these presents does bargain, sell, assign and transfer unto said party of the second part, and its successors and assigns, all the following artieles of personal property, situated in Custer County, Oklahoma Territory, to wit: All of his stock of cattle comprising 2170, Twenty one hundred and seventy head, branded with one or more of the following three described brands, to wit: 55 bar on left side, 55 left side, J. W. on either side, worth now $32650.00;

Said cattle consist of about the following classes:

(800) Eight hundred cows, three years old and up;

(200) Two hundred head are 2 and 3 year old steers;

(500) Five hundred head are 1 year old past steers;

(520) Five hundred and twenty head of 1 and 2 year old heifers and bulls;

(150) One hundred and fifty head of calves, mixed steers and heifers, and are located seven miles west of Weatherford, on Deer Creek in Custer County, Oklahoma Territory, where the same are being fed on corn, cotton seed, and sorghum, and being all the property of the above description owned or controlled by the

mortgagor now on said premises, and this mortgage is intended to cover and include all of said pro-erty of the above description and any addition and increase thereto located on the above described premises and range, if any, thereabouts. The marks and brands used above to describe said property are the holding marks and brands and carry the title, although said property may have other marks and brands. If the mortgagor should desire to mix any other property with the above, before doing so he shall give a full description of said property intended to be so mixed, with the name of the owner thereof to said second party, and obtain the written consent of said second party before mixing the same.

357 This mortgage shall also cover and include all the right, title and interest of the mortgagor in and to the pasturage, feed pens, feed troughs and water privileges used in feeding said live stock. Said property to remain and be kept on the premises above described until the full payment of the indebtedness hereinafter described, unless sooner marketed or removed by and with the written consent of the mortgagee or its assigns. When marketed, said cattle are to be shipped and consigned for sale to Drumm Flato Commission Company, at the stock yeards at Kansas City and when sold the proceeds thereof shall be applied first in payment of the usual and customary commissions to said Drumm Flato Commission Company for selling same, and the balance or so much thereof as may be necessary, shall be applied on the indebtedness hereinafter described. If said cattle, or any part thereof be consigned or sold elsewhere than above, then said mortgagee shall be paid a commission of 50 cents per head on all the above described cattle.

Provided always, and these presents are upon this express condition, that if said part- of the first part shall pay or cause to be paid unto the said party of the second part, its successors and assigns the commissions heretofore stated and agreed upon and the aforesaid sum of Twenty thousand three hundred and sixty seven 16/100 dollars ($20,367.16), according to the terms of seven certain promissory notes hereinafter described, executed by R. C. Edmisson, to the order of Drumm Flato Commission Company, and payable as follows:—

One note for $2187.50, dated Nov. 16th, 1898, payable six months after date:

One note for $1093.75, dated Nov. 19th, 1898, payable on May 25th, 1899, after date.

One note for $3405.60, dated Dec. 19th, 1898, payable on June 15th, 1899, after date;

358 One note for $1194.83, dated Dec. 19th, 1898, payable on June 6th, 1899, after date:

One note for $3100.88 dated Dec. 19th, 1898, payable on June 19th, 1899, after date;

One note for $6125.00 dated Dec. 19th, 1898, payable on June 23rd, 1899, after date:

One note for $3259.60, dated Dec. 19, 1898, payable on June 26th, 1899, after date; all payable at the office of said Drumm Flato Commission Company, Kansas City, and all with interest thereon at the rate of eight per cent. per annum from maturity or according to the

terms of any renewal or extension of said notes which may be made by consent of said second party, its successors or assigns, and may be evidenced by the execution of new note or notes in place of said original note- at or after maturity, for the amount of the debt then unpaid and payable hereunder, and for which this mortgage is and shall be a continuing security until paid, whether said debt be evidenced by said original note- above described or any renewals or extensions thereof, and which said notes the party of the first part hereby agree- to pay on the maturity thereof, then these presents and everything herein contained shall be void, anything herein contained to the contrary notwithstanding. And it is hereby mutually covenanted and agreed between the parties hereto, that if default be made in the payment of said sum of money, or any part thereof, or the interest thereon, according to the tenor and effect of said note, when the same becomes due and payable, or upon failure to conform to or comply with any of the conditions and agreements herein mentioned, then the whole sum of money hereby secured shall, at the option of the party of the second part or the legal holder or h-lders of said note or notes, become due and payable at once, without notice.

And it is further agreed that in case of sale or disposal or at-
359 tempt to sell or dispose of the goods and chattels hereby mortgaged, or a removal of, or attempt to remove, the same from the premises aforesaid, or an unreasonable depreciation in value, or if from any other cause the security shall become inadequate, or the party of the second part shall deem itself insecure at any time before said indebtedness is fully paid, whether the same be due or not, then and thenceforth is shall be lawful for the said party of the second part, its successors or assigns or its authorized agent to enter upon the premises of the said party of the first part or any other place or places wherein said goods and chattels or live stock aforesaid may be to remove and dispose of the same as aforesaid without resort to law, and without appraisement or notice (all right of redemption, appraisement and notice of foreclosure required by law being hereby expressingly waived), and all the equity of redemption of the said party of the first part, at public auction or private sale, to the person or persons who shall pay the highest price for the same, and out of the avails thereof to retain the full amount of said obligation, with the interest thereon, according to the conditions thereof, together with all reasonable costs and expenses attending the same and commissions aforesaid rendering to said party of the first part or his legal representative, the surplus money, if any there shall be, anything herein to the contrary notwithstanding. And until default be made as aforesaid, or until such time as the said party of the second part shall deem itself insecure, as aforesaid, the said party of the first part to continue in the peaceable possession of all of said goods and chattels, all of which in consideration thereof he agrees shall be kept in as good condition as the same now are, and taken care of at his own proper cost and expense; and upon the neglect or failure of said first party so to do, then said second party, its successors or as-
signs, may cause the same to be done, and for all expenses so
360 incurred and sums expended, this obligation shall be a continuing security; and if from any cause said property shall

fail to satisfy said debt and interest aforesaid, said party of the first part hereby agrees to pay the deficiency on demand.

In witness whereof, the party of the first part has hereunto set his hand and seal this 19th day of December, in the year of our Lord one thousand eight hundred and ninety eight.

R. C. EDMISSON.

Signed, sealed and delivered in the presence of
F. W. FLATO.
R. WATERS.

STATE OF KANSAS, *County of Wyandotte, ss:*

Be it remembered that on this 19th day of December, A. D. 1898, before the undersigned, a notary public duly commissioned and acting as such within and for the county of Wyandotte aforesaid, personally came R. C. Edmisson, to me well known to be the grantor described in and who executed and whose name is subscribed to the foregoing instrument of writing as party thereto, and stated and acknowledged to me that he executed the same as his free act and deed for the purposes and considerations therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Kansas City, in said County the day and year first above written.

My term of office as notary public will expire March 28, 1902.

JAMES RATCLIFFE,
Notary Public.

STATE OF KANSAS, *County of Wyandotte, ss:*

Affidavit of Ownership.

To obtain credit for the within amount, R. C. Edmisson, being duly sworn, upon his oath, says that the property, in number and kind as designated in the within instrument, is now located at the place or places stated in this instrument, and that the mort-
361 gagor herein is the lawful and absolute owner of said property described, that he has full power and authority to sell or mortgage the same and give clear title thereto, and that there are no liens or mortgages against said property.

R. C. EDMISSON.

Subscribed and sworn to before me this 19th day of Dec., 1898.

JAMES RATCLIFFE,
Notary Public.

Endorsed on back: Exhibit "D." No. 2987.

Chattel mortgage from R. C. Edmisson to Drumm Flato Commission Company.

STATE OF ——, —— *County, ss:*

A copy of this instrument was filed for record on the 23rd day of Dec. A. D. 1898, at 3 o'clock p. m., and duly recorded in Book 3 of E at page —.

J. M. MOORE,
Register of Deeds.

TERRITORY OF OKLAHOMA, *County of Woods, ss:*

I, C. P. Green, Register of Deed- in and for said County, hereby certify that the within is a true copy of a chattel mortgage filed in my office at Alva, Oklahoma Territory, Dec. 23, 1892, and recorded in book 3 at page E.

C. P. GREEN,
Register of Deeds.

By Mr. NOAH: We wish to offer the notes and get the Court's ruling on them, excluding them.

By the COURT: Offer them first, and let us see what they are.

By Mr. SNODDY: You have our objection in, have you, Mr. Stenographer?

By Mr. NOAH: We offer in evidence note marked "Exhibit G," and with it note marked "Exhibit H," one of the original and the
362 other the renewal of the same note. Exhibit G reads as follows:

By Mr. SNODDY: Well, now——

By Mr. NOAH: Well, I am not going to read it.

By Mr. SNODDY: Well, the objection is in here.

By the COURT: The Court will sustain the objection. The court will sustain it to one and all collectively and principally upon the ground there is no controversy over these notes or over the indebtedness. It is admitted on all hands; there is no controversy over these notes.

By Mr. NOAH: The defendant offers to introduce in evidence exhibits beginning with "Exhibit E," down to and including "Exhibit Z."

By Mr. SWINDALL: To all of which the plaintiff objects as incompetent, irrelevant and immaterial.

By the COURT: I suppose you have the ruling.

By Mr. SNODDY: To each and every one of them.

By Mr. NOAH: To which ruling of the Court, the defendant excepts. Now, we ask for leave to withdraw these. They have been marked and we wish to withdraw them.

By Mr. SWINDALL: We object to their withdrawal until the stenographer gets a copy.

By the COURT: The stenographer will make a copy.

By Mr. NOAH: That is our case, if your Honor please.

Said "Exhibit E" is in words and figures as follows, to wit:—

363 "EXHIBIT E."

$6288.35. RICHMOND, O. T., *June 9th*, 1899.

On Oct. 23rd, 1899, after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order Sixty two hundred eighty eight and 35/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

No. 8690. Due Oct. 23rd, 1899. 30571. 2170 cat.

Said "Exhibit F" is in words and figures as follows, to wit:—

364 "EXHIBIT F."

$6125.00. RICHMOND, O. T., *Dec. 19th*, 1898.

On June 23rd, 1899, after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order Sixty one hundred and twenty five no/100 Dollars, at the office of Drumm Flato Commission Company, Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

B. R. No. 7760. Due June 23, 1899. 2170 cat. 17245 June 23.

This note held as collateral security to note for $6288.35, dated 6-9-99, due 10-23-99.

"EXHIBIT G."

$3519.15. RICHMOND, O. T., *June 9*, 1899.

On Nov. 15th, 1899, after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order, Thirty five hundred nineteen and 15/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

4530. No. 8691. Due Nov. 15, 1899. 2170 cat.

365 "EXHIBIT H."

$3405.60. RICHMOND, O. T., *Dec. 19th*, 1898.

On June 15, 1899, after date without grace, for value received, I promise to pay to Drumm Flato Commission Co., or order Thirty four hundred and five 60/100 , Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

This note held as collateral security to note for $3519.15, dated 6-9-99, due 11-15-99.

B. R. No. 7758. Due June 15, 1899. 2170 cat. 172453 June 15.

"EXHIBIT I."

$6277.15. RICHMOND, O. T., *June* 9, 1899.

On Nov. 19, 1899, after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order Sixty two hundred seventy seven and 15/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 9 per cent. per annum.

R. C. EDMISSON.

The mortgage securing this note is duly stamped according to law.
4531. No. 8695. Due Nov. 18, 1899. 3340 cat.

Endorsed on back:— 12/11/99 Rec'd 4000.00.
1/2/1900 Do 500/80.

366

"EXHIBIT J."

$6074. —. RICHMOND, O. T., *Dec.* 19, 1898.

On June 19, 1899, after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order, Sixty hundred and seventy four 66/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

B. R.

This note held as collateral security to note for $6277.15, dated 6-9-99, due 11-19-99.
No. 7762. Due June 19, 1899. 3340 cat. 172458 June 19.

"EXHIBIT K."

$8120.20. RICHMOND, O. T., *June* 9, 1899.

On Nov. 19, 1899, after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order Eighty one hundred twenty and 20/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

The mortgage securing this note is duly stamped according to law.
No. 8696. Due Nov. 19, 1899. 3340 cat. 30573.

Endorsed on back:—Received 38 cts. Pro 93 cat net $2457.62.
" 6 " " 110.
" 210 " " 4200.

6767.62.

367 "EXHIBIT L."

$7858.26. RICHMOND, O. T., *Dec.* 19, 1898.

On June 19, 1899. after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order Seventy eight hundred and fifty eight 26/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

B. R.
No. 7765. June 19, 1899. 3340 cat. 172459 June 19.
This note held as collateral security to note for $8120.20 dated 6-9-99, due 11-19-99.

"EXHIBIT M."

$3204.20. RICHMOND, O. T., *June* 9, 1899.

On Nov. 19, 1899, after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order Thirty two hundred four and 20/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

The mortgage securing this note is duly stamped according to law.
No. 8692. Due Nov. 19, 1899. 2170 cat. 30572.

368 "EXHIBIT N."

$3100.88. RICHMOND, O. T., *Dec.* 19, 1898.

On June 19, 1899, after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order Thirty one hundred and 88/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

This note held as collateral security to note for $3204.20, dated 6/9/99, due 11/19/99.
B. R. No. 7759. Due June 19, 1899. 2170 Cat. 172455 June 19.

"EXHIBIT O."

$2260.44. CURTIS, O. T., *May 5th,* 1899.

On Oct. 16th, 1899, after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order Twenty

two hundred sixty and 44/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

No. 8448. Due Oct. 16, 1899.

369 "EXHIBIT P."

$2187.50. RICHMOND, O. T., *Nov. 16th*, 1898.

Six months after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order Twenty one hundred and eighty seven 50/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

This note held as collateral security for note for $2264.44, dated 5/5/99, due 10/16/99.
B. R. No. 7709. Due May 16, 1899. 2170 cat. 72451 May 16.

"EXHIBIT P-1."

$9690.00. CURTIS, O. T., *May 5th*, 1899.

On Oct. 11th, 1899, after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order, Ninety six hundred ninety and no/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

10609. No. 8447. Due Oct. 11, 1899. 3340 cat.

370 "EXHIBIT Q."

$9375.00. KIOWA, KAN., *Nov. 9th*, 1898.

On May 11th, 1899, after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order Ninety three hundred seventy five and no/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

This note held as collateral security to note for $9690.00 dated 5/5/99, due 10/11/99.
27672. No. 7587. Due May 11, 1899.

"EXHIBIT R."

$7186.70. RICHMOND, O. T., *June 9th*, 1899.

On Oct. 19th, 1899, after date, without grace, for value received, I promise to pay Drumm Flato Commission Co. or order Seventy one hundred eighty six and 70/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

No. 8693. Due Oct. 19, 1899. 3340 Cat. 30569.

371 "EXHIBIT S."

$7000.00. RICHMOND, O. T., *Dec. 19th*, 1898.

On June, 19, 1899, after date, without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order Seven Thousand no/100 Dollars, at the office of Drumm Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

This note held as collateral security to note for $7186.70, dated 6-9-99, due 10-19-99.

R. C. EDMISSON.

B. R. No. 7763. Due June 19, 1899. 3340 Cat. 172460 June 19

"EXHIBIT T."

$7186.70. RICHMOND, O. T., *June 9th*, 1899.

On Oct. 19th, 1899, after date without grace, for value received, I promise to pay to Drumm Flato Commission Co. or order Seventy one hundred eighty six & 70/100 Dollars, at the office of Drumm-Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

No. 8694. Due Oct. 19, 1899. 3340 cat. 30570.
The mortgage securing this note is duly stamped according to law.

372 "EXHIBIT U."

$7000.00. RICHMOND, O. T., *Dec. 19th*, 1898.

On June 19th, 1899, after date without grace, for value received, I promise to pay to Drumm-Flato Commisson Co., or order Seven Thousand no/100 Dollars, at the office of Drumm-Flato Commission

Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

No. 7764. Due June 19, 1899. 3340 cat. 172461. June 19.
This note held as collateral security to note for $7186.70 dated 6-9-99 due 10/19/99.
B. R.

Endorsed on Back: Pay Nat. Bk. of Com. or order Drumm-Flato Com. Co. per W. B. Stickney. Endorsement erased. ($1.40 in revenue stamps.)

"EXHIBIT V."

$3368.30. RICHMOND, O. T., *June* 17, 1899.

On Nov. 26, 1899, after date, without grace, for value received, I promise to pay to Drumm-Flato Commission Co., or order Thirty three hundred sixty eight and 30/100 Dollars, at the office of Drumm-Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

No. 8744 8421. 8904. Due Nov. 26, 1899. 2170 Cat.
The mortgage securing this note is duly stamped according to law.

373

"EXHIBIT W."

3259.60. RICHMOND, O. T., *Dec. 19th*, 1898.

On June 26th, 1899, after date, without grace, for value received, I promise to pay to Drumm-Flato Commission Co., or order, Thirty two hundred and fifty nine 60/100 Dollars, at the office of Drumm-Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

This note held as collateral security to Note for $3368.30, dated 6-17-99, due 11-26-99. B. R.
No. 7761. Due June 26th, 1899. 2170 cat.
($.66 in revenue stamps on back, cancelled.)

"EXHIBIT X."

$1137.75. RICHMOND, O. T., *May* 20, 1899.

On Nov. 25th, 1899, after date, without grace, for value received, I promise to pay to Drumm-Flato Commission Co., or order, Eleven hundred thirty seven & 75/100 Dollars, at the office of Drumm-Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

No. 8519. Due Nov. 25th, 1899.
The mortgage securing this note is duly stamped according to law.

374 "EXHIBIT Y."

$1093.75. RICHMOND, O. T., *Nov.* 19, 1898.

On May 25th, 1899, after date, without grace, for value received, I promise to pay to Drumm-Flato Commission Co., or order, Ten Hundred and Ninety three 75/100 Dollars, at the office of Drumm-Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

This note held as collateral security to note for $1137.75, dated 5/20/99, due 11/25/99.

No. 7710. Due May 25, 1899. 2170 Cat. 72452, May 25. B. R.

"EXHIBIT Z."

$1194.83. RICHMOND, O. T., *Dec. 19th*, 1898.

On June 6th, 1899, after date without grace, for value received, I promise to pay to Drumm-Flato Commission Company, or order Eleven Hundred & Ninety Four 83/100 Dollars, at the office of Drumm-Flato Commission Co., Kansas City, Kansas, with interest from maturity at 8 per cent. per annum.

R. C. EDMISSON.

No. 7757. Due June 6, 1899. 2170 Cat. B. R. 172454, June 6.

Endorsed on back: Pay Nat. Bk. of Com. of order Drumm-Flato Com. Co. per W. W. Stickney.

375 By Mr. SWINDALL: Call Mr. Tolbert.

A. W. TOLBERT.

A. W. TOLBERT, called as a witness on behalf of the plaintiff in the above entitled cause, in rebuttal, testified as follows:

Direct examination by CHAS. SWINDALL:

Q. You are the same A. W. Tolbert who was sworn the other day, are you?

A. Yes sir.

Q. Are you acquainted with J. F. Bryson?

A. I have saw him a time or two.

Q. State whether or not you saw him at Curtis in Woodward County, Oklahoma Territory on the seventh of December, 1899, at the time the Edmisson cattle were being driven into the stock-yards at the gate?

A. Well, I couldn't say to the date of the month.

Q. Well, the time the Edmisson cattle were being driven there?

By Mr. NOAH: That is objected to as incompetent, unless the time is fixed as after the date of this contract.

By the COURT: There is only one time the cattle were there. The witness testified he remembered the date.

By Mr. NOAH: There was another bunch shipped there, of Edmisson cattle by Bryson.

By Mr. SWINDALL: I fixed the time in December.

A. I was riding the line there.

Q. Well, state whether or not you had a conversation with Mr. Bryson in the town of Curtis as he was driving the cattle into the stockyards there, in which he stated to you that these cattle had been worked and the strays cut out and the cattle counted through the gate out of the Edmisson pasture into the Harrington pasture by the boys?

A. Yes.

376 By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial, because no proper predicate has been laid for his impeachment.

By the COURT: They laid the impeachment.

By Mr. SNODDY: I think it was about when they crossed the railroad.

By the COURT: I remember the predicate and I remember it suggested itself to my mind that the only part of this conversation that was material here at all was whether they were counted or not.

A. Yes sir, I was riding——

By Mr. NOAH: Just a moment. The court overrule- the objection?

A. I was riding line——

By the COURT: Yes sir.

A. I was riding line and of course I had to look after the cattle that went through the fence either way. I followed these cattle to the stockyards and I asked Mr. Bryson had they been worked, and he said Yes. In the first place, I asked who was in charge of the cattle and they sent me to Bryson and I asked him had those cattle been cut and worked, and he said yes they had; told me who worked them, said Maxwell and Morris' men worked them, and worked them close, worked them as they came through the Harrington gate.

By Mr. SWINDALL: Cross Examine.

By the COURT: Cross examine.

Cross-examination by H. A. NOAH:

Q. Where was this, Mr. ——?

A. That was at Curtis where I saw Mr. Bryson.

Q. When?

A. When he was shipping those cattle.

Q. What month?

A. December.

377 Q. What part of December?

A. I don't remember the day.

Q. The first or tenth——?

A. I don't remember the dates, I couldn't say.
Q. Might have been the thirtieth of November?
A. No, it was about—I don't remember the date when it was.
Q. Might have been Thanksgiving? Was it after Thanksgiving or before?
A. I think it was just before.
By Mr. NOAH: That is all.

Witness excused from the stand.

TOM GOVIER.

TOM GOVIER, called as a witness on behalf of the plaintiff in the above entitled cause, being first duly sworn, testified in rebuttal as follows:

Direct examination by CHAS. SWINDALL:

Q. Where do you reside, Mr. Govier?
A. Curtis, Oklahoma.
Q. Where were you residing in November, 1899?
A. Curtis, Oklahoma.
Q. Are you acquainted with Mr. J. F. Bryson. The gentleman that testified here this morning?
A. Somewhat, yes sir.
Q. State what business if any, connection you had with him in November, 1899?
A. I cooked for the round up of those cattle.
Q. What cattle?
A. Why, I suppose it was the Edmisson Commission house at Kansas City, I suppose that is what it was.
Q. State whether or not you was at Mr. Edmisson's house the evening that the cattle were counted through the gate into
378 the Harrington pasture?

By Mr. NOAH: Wait a moment. That is objected to as incompetent, irrelevant and immaterial, leading and suggestive.
By the COURT: Objection overruled.
By Mr. NOAH: Except.
By the COURT: It is simply preliminary.

Q. Did you see Mr. Bryson on that evening?
A. Yes sir, saw him every day.
Q. What time did he come to supper that night? That evening?
A. I couldn't state the exact hour he come to supper.
Q. Well, was it before dark or after dark?
A. If I remember rightly, Mr. Bryson come to supper and changed horses, and I think Mr. Bryson said that the cattle would have to be night herded, and if I remember correctly, he got his supper, changed horses and went back to the cattle.
Q. Yes sir. State whether or not the count of these cattle was talked over there by the parties in the presence of Mr. Bryson?
A. I couldn't say positive to that. The Count was talked over perhaps of the same bunch, but it was talked of every day more or less.

Q. Generally talked of among the boys?
A. Yes sir.
Q. When Mr. Bryson was at the wagon?
A. No, Mr. Bryson wasn't at the wagon. I don't think Mr. Bryson eat at the wagon this particular time. This particular time I think Mr. Bryson eat at the house.
Q. Well, was it talked at the house?
A. I wasn't at the house. I was at the wagon where the other men come in at different times during the evening and had supper, and I think the cattle were talked of, the count of the cattle were talked of there among the boys while eating supper.

379 By Mr. SWINDALL: That is all.

Cross-examination by Mr. YOUNG:

Q. What time,—well, that is all Mr. Govier.

By Mr. SWINDALL: Just a minute, Mr. Govier.

Q. Are you acquainted with the plaintiff Mr. R. C. Edmisson?
A. Yes sir.
Q. Are you acquainted in the vicinity where he resides?
A. Yes sir.
Q. How long have you been acquainted with people there?
A. About eleven years.
Q. Are you acquainted with his general reputation in that vicinity for truth and veracity, made up of what the majority of the citizens there say about him?

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial. Mr. Edmisson's reputation is not in issue.
By the COURT: No sir.
By Mr. SWINDALL: I think they put it in issue.
By the COURT: I do not know when. You may stand aside, Mr. Govier.

Witness excused from the stand.

ELY ROBERTS.

ELY ROBERTS, called as a witness on behalf of the plaintiff in the above entitled cause, in rebuttal, being first duly sworn, testified as follows.—

Direct examination by Mr. SWINDALL.

By the COURT: Were you sworn, Mr. Roberts?
A. Not at this time. I was on the stand yesterday.
Q. Mr. Roberts, do you remember the day that Mr. Bryson
380 and Edmisson and others drove the cattle, Edmisson cattle, to the town of Curtis?
A. Yes sir.
Q. State whether or not you went with them with that herd of cattle to the town of Curtis?
A. I went within three quarters of a mile, probably a mile.

Q. About how long was you with the herd?
A. About six miles.
Q. How many men were there at that time?
A. Well, I think probably there was eight or ten.
Q. Was the count of these cattle talked over going down there that day?

By Mr. NOAH: Just a moment. That is objected to as incompetent, irrelevant and immaterial, unless it is first shown this is the same bunch that were shipped on November 22, under the contract of——

By the COURT: I suppose they were referring to that.

Q. Was this the same bunch of cattle you saw them counting through the gate there?
A. Yes sir.
Q. State whether or not this count was talked over there while they were going down to Curtis in Mr. Bryson's presence?
A. I don't—I remember talking to some of the boys and asking about the number of cattle, I don't remember talking to Mr. Bryson.
Q. He was there with the herd, was he?
A. Yes sir.

By Mr. SWINDALL: That is all.

By Mr. YOUNG: That is all.

Witness excused from the stand.

381 JOHN J. GERLACH.

JOHN J. GERLACH, called as a witness on behalf of the plaintiff in the above entitled cause, being first duly sworn, testified as follows:—

Direct examination by CHAS. SWINDALL.

Q. Where do you reside, Mr. Gerlach?
A. Woodward, Oklahoma.
Q. What business are you engaged in?
A. Merchandising and banking.
Q. What business were you engaged in in November and December, November and December, 1899, and January, 1900?
A. Merchandising and banking.
Q. Are you acquainted with James Gober?
A. Yes sir.
Q. Were you acqainted with him at that time?
A. Yes sir.
Q. State whether or not Mr. Gober in your bank in the town of Woodward, stated to you that in gathering the Edmisson cattle that he had a good thing in the deal and that he was to get three dollars per head and he would make from fifteen hundred to two thousand dollars out of the transaction?

By Mr. NOAH: Objected to as incompetent, irrelevant and immaterial, and for the further reason that was not the foundation laid in the predicate, it was a thousand to fifteen hundred.

Q. Well, from a thousand to fifteen hundred?

By the COURT: I don't remember the exact amount.

A. He made that statement to me, only it was he might make even more than that.

By Mr. SWINDALL: Yes sir; that is all.

By Mr. NOAH: That is all.

Witness excused from the stand.

382 R. C. EDMISSON, recalled as a witness in rebuttal in his own behalf, being first duly sworn, testified as follows:

Direct examination by CHAS. SWINDALL:

Q. Mr. Edmisson, these cattle that was taken from your place by Mr. Gober, state whether or not they were taken from there by your knowledge or consent?

A. No sir.

Q. State whether or not the proceeds of the notes,—proceeds of the sale of these cattle were applied to the payment of your notes that you signed?

A. No sir.

By Mr. NOAH: That is objected to as incompetent, irrelevant, and immaterial.

By the COURT: Objection is overruled.

By Mr. NOAH: Except.

Q. Did you answer the question, Mr. Edmisson?

By the COURT: Yes, he answered it.

By Mr. SWINDALL: That is all.

By the COURT: Do you want to cross examine? Mr. Edmisson, I want to ask one or two questions. In delivering these cattle which you claim was nineteen hundred and ten head——

A. Seventeen hundred and ten, you mean.

By the COURT: Seventeen hundred and ten, was there anything said by the commission company or the agent doing the work or yourself about receiving these cattle under the mortgage?

A. No sir, no sir. They held out the idea to me they were going to receive them under the contract. When Mr. Bryson and I talked the matter over, he said there was a hundred and ninety head due him under the contract, in the first clause. He said then after
383 that if I could get a hundred more, why they would have one hundred more. He seemed to know about the contract himself. I had the contract and he looked at it and he didn't seem to have any contract, but he looked at my copy, or the original, whichever you mind to call it.

By the COURT: Did Mr. Gober or anyone say anything to you about taking these cattle under the chattel mortgage, either of them, that he took, or that you claim he took?

A. Mr. Gober told me he had orders to take all the cattle, didn't say whether it was under the chattel mortgage or contract.

By the COURT: Did you ever receive any of your notes?
A. No sir.
By the COURT: That those chattel mortgages were given to secure.
A. No sir.
By the COURT: Were they cancelled in any way, any part of them?
A. Not that I know of.

By Mr. SWINDALL:

Q. Mr. Edmisson, I will ask you if it is not a fact you were present at the trial of the case of the Drumm Flato Commission Company versus the Gerlach Bank of Kansas City in 1901, and at that time had any credits been made on those notes?

By Mr. NOAH: That is objected to as incompetent, irrelevant and immaterial.
By the COURT: Well, if he says he knows he may state.

A. They showed me the notes and had me to identify them at that trial.
Q. Were there any credits given on those notes at that time?
A. There were no credits on the notes at that time.
By Mr. SWINDALL: That is all.
By Mr. NOAH: That is all.

By Mr. SWINDALL: We now desire to offer in evidence question number one in the deposition of Millard Holman. Objec-
384 tion was sustained yesterday for the reason that it might be competent in rebuttal, wasn't competent at that time: The question is as follows: "State whether or not, Mr. Holman, if a large number of these cattle had been cut out of the herd after you turned them into the Roberts pasture, up to the time you quit working at Curtis, you would have known it."
"Defendant- counsel objects because the question is leading, and would call for a conclusion of the witness."

By Mr. NOAH: We renew the objection.
By the COURT: What is the objection?
By Mr. SWINDALL: Calls for a conclusion and as leading.
By Mr. NOAH: Also incompetent, irrelevant and immaterial.
By the COURT: Is that not a conclusion? He may state the facts and let the jury infer.
By Mr. NOAH: Hypothetical question, calling for a conclusion.
By the COURT: He may state the facts.

By Mr. SWINDALL: Then this question follows: "State whether or not of your own knowledge any of these cattle were cut out that you counted through the gate into the Roberts pasture, or any cut out of this herd before they were delivered to the railroad company for shipment, at Curtis? Answer: Not to my knowledge.
By the COURT: How is that? Read it again.
By Mr. SWINDALL: "State whether or not of your own knowledge any of these cattle were cut out that you counted through the gate into the Robert's pasture, were cut out of this herd before they were

delivered to the railroad company for shipment at Curtis. Answer: Not to my knowledge." And the next question is: "State whether or not he would have known it.

By the COURT: Yes, I think if he was with them all the time, taken in connection with——

385 By Mr. SWINDALL: "State whether or not, Mr. Holman, if a large number of these cattle had been cut out of the herd after you turned them into the Roberts pasture up to the time you quit work at Curtis, you would have known it?" Answer: "I would have known it." Question: "State whether or not within your knowledge any of these cattle——"

By Mr. NOAH: Just a moment. We except to this.

By Mr. SWINDALL: (Reading.) "Were cut out of the herd after you counted them and until the time you quit work for Mr. Bryson?" Answer: "Not with the exception of the eight or ten head."

By Mr. NOAH: Objected to as incompetent, irrelevant and immaterial, not proper rebuttal.

By the COURT: Overruled.

By Mr. NOAH: Except.

By Mr. SWINDALL: "Not with the exception of the eight or ten head I saw cut out of the herd when I went to Curtis."

By Mr. NOAH: My recollection is he wasn't there all the time. That he went ahead of the cattle.

By Mr. SWINDALL: Mr. Edmisson, just one further question.

R. C. EDMISSON.

R. C. EDMISSON, recalled as a witness in hiw own behalf, testified as follows:

Direct examination by CHAS. SWINDALL:

Q. Mr. Edmisson, state whether or not there was any tally of this first train load of cattle that you counted, that you shipped out of Curtis to Kansas City on the seventh of December or about that date, to Kansas City, that you had any knowledge of.

A. No count that I know of at all.

Q. Did you have anybody appointed there at all to assist in this count for you?

386 A. No sir.

Q. Did you see Mr. Bryson making any count?

A. I seen Mr. Bryson loading the cattle, and he was sometimes down to the cattle pens punching them up like the rest of the boys. If he was keeping any tally I didn't know it.

By Mr. SNODDY: One moment, Your Honor.

By Mr. SWINDALL: That is all.

By the COURT: Gentlemen of the Jury: We will take a five minute recess. I have to send a telegram. Let me know before I go out how long this case will take.

By Mr. SWINDALL: We are through now.

By Mr. NOAH: We are through.

By the COURT: How long will it take to argue it?

By Mr. SNODDY: There is a good deal of evidence to argue here.

By the COURT: Gentlemen of the Jury: Remember the admonitions of the Court heretofore given you. Have you any special instructions, gentlemen?

By Mr. SWINDALL: We were figuring on presenting some, but we got through the evidence sooner than we expected to.

By Mr. SNODDY: We will prepare some instructions.

By the COURT: I am ready to instruct the jury.

By Mr. SWINDALL: I didn't suppose the court had the general instructions ready. We could take up something else, and we could argue it in the morning; couldn't any more than give the jury the instructions tonight, anyhow. Of course, I am not caring specially about these special instructions, because I think the court will cover the ground anyhow.

By Mr. SNODDY: I won't offer any unless I think they will be given.

By Mr. SWINDALL: I won't offer any; I don't want to be reversed.

387 By the COURT: Gentlemen of the Jury: It is now adjourning time, and the Court will adjourn this case until tomorrow morning at nine o'clock. During the adjournment, you will not talk with anyone about this case nor allow anyone to talk with you, nor talk among yourselves, nor form nor express an opinion in the case until it is finally submitted to you. Be in your seats promptly at nine o'clock tomorrow. You may adjourn Court, Mr. Crier, until nine o'clock tomorrow morning.

Here court adjourned until nine o'clock a. m. April 30, 1904.

At nine o'clock a. m. April 30, 1904, the trial of the above cause was resumed. Jury all present. Counsel for plaintiff and defendant present.

Here counsel for plaintiff, Mr. Swindall, presents special instructions requested by plaintiff to the court.

By the COURT: I asked you gentlemen for your instructions last night.

By Mr. SWINDALL: That is not a very long one, your Honor, it won't take you very long to read it.

By the COURT: You are not in time. I cannot read it now. I must have time to go over them in advance.

Here Counsel for defendant presents special instructions requested by defendant to the court.

By Mr. NOAH: We understand the court that he can't receive any further instructions?

By the COURT: No sir, Mr. Noah. I asked for instructions last night. I have been working on legal propositions here in court and certainly I must have time to look over these instructions and give them that consideration that must be given to instructions. I asked you all for them last night.

By Mr. NOAH: Yes sir, we had them to prepare. We were all surprised at the short time the case took.

388 By the COURT: You should have known something about that. What is the Court to do? To take up the instructions and read them without any consideration at all?

By Mr. NOAH: I realize it, your Honor, but it is just as hard on counsel.

By the COURT: I shall not look at them because they were not given at the time I asked for them. It is too late now.

By Mr. NOAH: We wish the Court to put certain interrogatories to the jury.

By the COURT: Very well, I will receive those.

By Mr. NOAH: And further, we ask an exception be received to the refusal of the Court to give special instructions and have them all read here.

By the COURT: Yes sir.

By the COURT (reading from special interrogatories): The question numbered Two: "Who paid the expenses of gathering the Ed misson cattle gathered after November 22, 1899", will be refused.

By Mr. NOAH: To which refusal, the defendant excepts.

By the COURT: Is Gober in this case also?

By Mr. NOAH: No sir, dismissed as to him long ago.

Here the Court instructs the jury as follows:

389 In the District Court of Woods County, Territory of Oklahoma.

#361.

R. C. EDMISSON, Plaintiff,
vs.
THE DRUMM FLATO COMMISSION COMPANY, Defendant.

Instructions.

GENTLEMEN OF THE JURY:

The Plaintiff, R. C. Edmisson, sues the Drumm Flato Commission Company, a corporation, to recover the sum of eight thousand dollars alleged to have accrued to the plaintiff by reason of the defendant having wrongfully converted four hundred and ten head of cattle belonging to the plaintiff, which were of the value of eight thousand dollars.

In the plaintiff's petition in this case there are a number of things set up, among them being the fact that the plaintiff had given the defendant certain mortgages upon certain cattle and that thereafter the plaintiff and the defendant entered into a contract whereby the plaintiff was to deliver to the defendant nineteen hundred head of cattle in full satisfaction of the indebtedness covered by the mortgages, upon one condition, however, that in case the plaintiff gathered twenty one hundred head of cattle, all told, then the defendant was to receive two thousand head instead of nineteen hundred head.

The plaintiff alleges a compliance with this contract, that is, the

delivery of a certain number of the cattle and an offer to deliver the remainder, and then alleges that the defendant wrongfully and unlawfully took possession of four hundred and ten head of his cattle of the value of eight thousand dollars, and converted them to the use and benefit of the defendant, to the damage of the plaintiff in the sum of eight thousand dollars.

390 So far as this case is concerned, all the allegations in this petition, except the allegations of wrongful conversion of the four hundred and ten head of cattle alleged to be of the value of eight thousand dollars, you will not need to bother yourselves about them, as after considering the entire pleadings, the court instructs you that the only propositions in the pleadings are those arising out of the allegations of wrongful conversion.

The defendant in this case by way of answer filed a general denial and also admitted the execution of the contract to deliver to the company nineteen hundred head of cattle or two thousand head under the proviso. They deny that they converted any of the cattle of the plaintiff, as alleged in the petition, and set up the fact of their having taken chattle mortgages from the plaintiff in a large sum, the amount not being material here for this purpose, and that instead of taking the cattle that were alleged to have been taken wrongfully and converted, that they took what cattle they did take under and by virtue of their chattel mortgage lien, and claimed they so had a right to take them and foreclose their mortgage or mortgages.

There has been a reply filed in this case which I deem it unnecessary to call to the attention of the jury, because of the allegations of the plaintiff's petition and the defendant's answer being such that in this case a reply was not necessary, under the law as it exists.

2. The burden is upon the plaintiff in this case to show the wrongful conversion of the property and its value. In other words the burden is upon the plaintiff to show or to prove all the material allegations of his petition, before he can recover.

3. I might say here too, that while the defendant admits the execution of the contract as set forth in the plaintiff's petition by copy, I believe, they claim in the answer that the contract is void

391 because of the fact that there was no valid consideration for it, that is, they *they* having had the mortgages upon this property, they had the right to take possession of the property and they had a right to do all things and to exercise all powers and control over it under and by virtue of the chattel mortgages that they could exercise under and by virtue of the contract itself; therefore, there being no new consideration other than what was contained in the consideration given for the mortgages, that the contract was a nullity.

In this regard, the court instructs you that the contract was a binding and subsisting obligation between the parties. It had a sufficient consideration and the effect of it was to change the title to the property, which was then in the plaintiff, the defendant only having a lien by reason of his mortgages, and placing the legal title in the defendant instead of a lien under the mortgages. The only thing remaining after the contract was executed was the delivery of

the property by the plaintiff to the defendant. When that was done it was not only executory but an entirely executed contract, if you find there was a delivery.

4. This contract being a binding and subsisting obligation upon both of the parties in this case, it could not be set aside or disposed of in any way except by a rescission of the contract, and that rescission must have been from some sufficient legal reason, or for some sufficient legal reason.

In this case, the court instructs you that there has been no sufficient legal reason shown for rescinding this contract, and as a matter of law, it was not rescinded, so that under the law of this case this contract being in existence and being a legal and binding obligation upon both parties then whatever was done by way of getting or giving possession of the cattle on the part of the plaintiff to the defendant and taking possession of part of the cattle by the defendant to the extent of the number set forth in the contract, and the rights
392 of the parties thereunder, must all be considered and taken to have been done under the contract and not under the mortgage or mortgages.

5. The Court further instructs you, gentlemen of the jury, that if you find that the plaintiff delivered any of the cattle to the defendant, then he should have credit for that number as having been delivered under the contract, it being his duty to deliver the cattle a- they ran on the range.

If the plaintiff failed to deliver the cattle, or any part of the cattle, then the defendant would have a right to go into the pastures or whereever he may have found the particular cattle that were included in the contract, and there peaceably gather a sufficient number, if he could find them, to complete this contract.

6. The question of expense in gathering the cattle is immaterial here, and you will not consider it in any way. It is not a part of this action.

Now, the plaintiff can only recover in this case, if at all, for any excess of cattle that the defendant took in excess of the amount and number they had a right to take under and by virtue of the terms of this contract. It being the plaintiff's duty to deliver the cattle to the defendant as they ran upon the range if the plaintiff failed to do that, the defendant having a right to complete the contract, the plaintiff cannot recover for any amount except that which is in excess of the number named in the contract, and that would be in this case, nineteen hundred head of cattle, unless there were twenty one hundred head found, and in that case, they could receive two thousand head, the defendant was entitled to receive two thousand head.

7. Now I stated that this is an action which would be denominated at common law as trover, that is, the wrongful conversion of personal property.
393 Conversion of personal property is an unauthorized act which deprives a man of his property permanently. In such a case, no demand for the return of the property is necessary. Under our statute and laws, the detriment caused by the wrongful

conversion of the property of another, as applicable to this case, if you find there was a conversion is the value of the property at the time it was taken, with seven per cent. interest thereon from that date until the present time. In other words, gentlemen of the jury, if you find that the defendant did take the cattle of the plaintiff in a number in excess of the amount mentioned in the contract, then the plaintiff is entitled to recover in a sum which is the value of the excess so taken, and interest thereon from the time taken until the present time.

8. As I stated before there are many things set up in these pleadings which have become material under the present conditions of this case and which will not give you very much concern. The main propositions in this case for you to decide, will be, first, whether or not under all the evidence, the defendant did or did not get more than nineteen hundred head of cattle, in one instance, or the two thousand head in the other, under the proviso. If you find that the defendant did not get more than that number of cattle then that is the end of this case and you should find for the defendant. But if you find that the defendant did get more than nineteen hundred head of cattle, under the one c-ause, or two thousand head under the other clause, then you should find the number of cattle so taken and the value thereof, and assess the damages of the plaintiff at the value of those cattle, adding interest from that date to this at the rate of seven per cent.

9. You are the exclusive judges of the testimony and of the credibility of the witnesses. It is for you to say what is proven and what is not proven in this case. In considering the testimony
394 of the different witnesses, you will take into consideration the interest of the witness, if any has been shown, his demeanor upon *upon* the witness stand, his knowledge of the things concerning which he testifies and all the facts and circumstances connected in any way with this case, which will help you to determine the credibility of the different witnesses.

If you believe that any witness has wilfully and knowingly testified falsely to any material matter in the case, you may disregard the whole of the testimony of such witness, except in so far as it is corroborated by any other credible evidence in the case. You need not necessarily disregard the whole of his testimony, but you may do so, except in so far as it is corroborated by other credible evidence.

You should carefully consider the testimony of each and every witness and give it that weight to which you think it is entitled under all the surrounding circumstances of the case.

10. It is suggested gentlemen, and it is proper to say to you that a person may deal through an agent, and in this case, the acts of Mr. Bryson with reference to these cattle and the acts of Mr. Gober were the acts of the defendant, they being shown and it is conceded that they were the agents of the defendant; so that any act you may find that they did, you will consider it just the same as though it was done by the defendant. Of course, such an act of an agent must be within the scope of his authority; that is, in connection with

these cattle, in taking, delivering, counting and shipping them, and so forth.

11. In connection with the instruction that the court gave you that the burden is upon the plaintiff, that is the plaintiff must prove all the material allegations of his petition by the preponderance of the testimony, the court instructs you also that by the weight
395 of the testimony it is not meant necessarily the greater number of witnesses, but that when you place the whole matter in the scales, the balance must be in favor of the plaintiff. That is, your minds must be convinced by the plaintiff that he is right. That is what is meant by the burden of proof. There may be one witness or two witnesses or any small number of witnesses upon one side, and a large number upon the other side yet that doesn't constitute weight of testimony or preponderance of testimony.

12. The Court will further instruct you, gentlemen, that there has been some evidence dropped into this case showing that there were tax liens upon some of this property or all of it. This can only be material in this case if the evidence shows that by virtue of these tax liens the defendant did not get the property, but if the defendant did get the property, then though he had to pay off the liens, still the fact that there was a tax lien would cut no figure in the general verdict in this case. While the plaintiff should have delivered these cattle free from any other liens than those of the mortgages, yet if the defendant had to pay any amount to clear the cattle of any lien he had his right of action against the plaintiff for that amount and it can not be set up as the defense in this case, for two reasons, at least; first, that no allegation of that kind is contained in the pleadings, and second, it is not a proper defense to this action.

13. You will be furnished with two forms of verdict, one to be used in case you find for the plaintiff, with the amount left blank in which you will insert the amount of recovery, or the amount of damages to which you find the plaintiff is entitled. Another form of verdict will be furnished you to be used in case you find for the defendant. When you have arrived at a verdict, you will have your verdict signed by your foreman and return into court.

14. The Court will submit to you certain special questions
396 which you are to answer in case you find for the plaintiff. These questions are submitted on behalf of the defendant, and if your verdict is for the defendant, you will not need to sign either of these special interrogatories. The answers to these interrogatories will be filled in by you at the point where the answer is designated, and you must answer each and every one of them except Number Two which the Court has refused to submit to you for your signature. These special interrogatories will also be signed by your foreman at the end. You will write in the answer at the proper place and then sign them all as a whole by your foreman, the same as you do the verdict.

Endorsements: Instructions. R. C. Edmisson *vs.* Drumm Flato Commission Company. Filed May 1, 1904. E. P. Kelly, District Clerk. Ent.

397 Court convened Saturday, April 30th, 1904, at 9 o'clock A. M. Pursuant to adjournment *to*.

Present the Hon. J. L. Pancoast, sole presiding Judge, E. P. Kelly, Clerk, D. C. Oates, Sheriff, S. T. Jocelyn, Stenographer, and N. W. Magruder, Crier.

Public proclamation of the opening of court having been announced, proceedings were had as follows, to wit:—

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R. C. EDMISSON
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DRUMM FLATO COMMISSION CO.

And now on this 30th. day of April, 1904, this cause comes on for further hearing: And the plaintiff being present in person and by his attorneys Snoddy and Son, Chas. Swindall, and D. P. Marum; and the defendant being present by its attorneys H. A. Noah and O. G. Young; And comes the Jury and all Jurors being present the court instructs the jury orally. And Chas. Swindall and W. W. S. Snoddy argue the cause to the jury in behalf of the plaintiff and H. A. Noah and O. G. Young argue the case to the Jury for defendant.

And the hour of noon having arrived the court admonishes the jury and excuses them until 1:30 P. M.

And now court adjourns until 1:30 P. M.

Court convened at 1:30 P. M. Pursuant to adjournment.

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And now this cause comes on for further hearing and all parties being present. And comes the jury and all Jurors being present they retire in charge of a sworn bailiff to consider their verdict herein.

398 And now the Court takes an indefinite recess.

Court convened at 7:30 P. M.

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R. C. EDMISSON
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DRUMM FLATO COMMISSION CO.

Comes now the jury into court in charge of their sworn bailiff and ask further instructions as to the special interrogatory questions

given by the Court: And the plaintiff and defendant both being present by counsel, the Court, by the consent of the attorneys for both plaintiff and defendant, explains the said questions; and the jury retire in charge of their sworn bailiff to further consider their verdict herein.

And now the Court takes an indefinite recess.

Said special interrogatories submitted to the jury by the defendant are in words and figures as follows to wit:—

399 After the court instructed the jury, the following proceedings were had:—

By Mr. NOAH: If the court please, we would like to save an exception to the instructions as a whole and also to each and every individual instruction. Shall I hand in these instructions I handed to you at first? You pretty nearly covered them, I think.

By the COURT: If there is anything I left out, I would like to look at them. How long do you wish to argue this case, gentlemen?

By Mr. NOAH: If the Court please, we would like to save an exception to those last instructions, on the part of the defendant.

By the COURT: Yes sir.

Thereupon counsel for plaintiff and defendant argued the case to the jury.

After argument of counsel, the following proceedings were had:—

By the COURT: Gentlemen of the Jury: This case will now be submitted to you for your consideration. The Court has had the instructions written out and they will be submitted to you and you will have the use of them. I have made, Mr. Noah, two or three little interlineations where I thought proper.

By Mr. NOAH: I have no doubt it is all right.

By the COURT: Where the words didn't properly express the meaning, and have noted it so the original and the interlineations will show. You will have the plaintiff's petition, the defendant's answer, and the reply, and the copy of the contract which was admitted in evidence; that is, the contract of which I have spoken in the instructions, the instructions of the court, the two forms of verdict and the list of interrogatories that have been submitted to you. Preserve all of these papers and return them into court. Gentlemen, I will not submit the case to you until after dinner. It is now just twelve o'clock and I will withhold all the papers until after dinner

400 and submit the case to you immediately after dinner. The case will be adjourned until half past one. During the adjourned hour, you will remember the admonitions the court has always heretofore given you. You will not talk with anyone about the case nor allow anyone to talk to you, nor talk among yourselves, nor form nor express an opinion in the case until it is finally submitted to you. Be in your seats at half past one.

Here Court took an adjournment until half past one o'clock p. m. April 30, 1904, at which time the following proceedings were had:

By the COURT: Bailiff sworn in this case?

Here Bailiff was sworn to take charge of jury.

By the COURT: Gentlemen of the Jury, you may now retire for

consideration of your verdict. Pass right through here to the other side.

Here the jury retires.

Thereafter, at 8.45 p. m., April 30, 1904, the jury in the above entitled case returned into court.

O. G. Young present on behalf of defendant; D. P. Marum and R. C. Edmisson present.

By the COURT: Gentlemen of the Jury, in answer to your requests, by consent of counsel, the court will explain, first, that the object of the special interrogatories is to draw from you the fact upon the given proposition contained in the interrogatory. It is to draw from you an expression or answer to that question. Further than that probably it is not material to the jury as to what the object is, as it then becomes, after these interrogatories are answered, a matter which the court must deal with. The statute provides that these interrogatories or as they sometimes are termed, special verdict, may be submitted to the jury and must be answered to the same extent as the general verdict. They are used in determining the future legal propositions arising in the trial and sometimes special
401 interrogatories control the general verdict, notwithstanding you may find a general verdict. Is that satisfactory in the way of answer, or is there anything else you have in mind?

By a JUROR: Is that directed particularly to the form?

By the COURT: No.

By another JUROR: Your Honor, that is satisfactory as far as that goes, but it is not satisfactory to my mind without some exception. Would you accept a minority decision on any of those matters?

By the COURT: No sir, the jury must agree upon these special answers or answers to these special interrogatories in the same way that they must agree upon the general verdict. That is to say, if you can agree and the supposition is, of course, you can agree upon the facts. Now, what the effect of these answers will be on the general verdict, I think is immaterial so far as the jury is concerned. What effect they will have upon the general verdict will be a matter for the Court and the Court cannot say what effect they will have until I read them. I might say if they are consistent with the general verdict, they will have no effect on the general verdict. If they are inconsistent with the general verdict, then they may have an effect. As to the third inquiry, I told you that you should answer, I told you in my general instructions, you should answer each and all of these interrogatories. Is that all that is bothering you, gentlemen?

By a JUROR: I guess it is, your Honor.

By another JUROR: We are not agreeing on the general verdict either.

By the COURT: Well, you have not come to an agreement yet, or you would have it with you. I might say further if it be of any information or advantage to you, that you should take up each one of these interrogatories when you come to them in the proper
402 way or when you see fit and apply the evidence bearing upon the proposition to that question and determine what is proven on that point, that is, in other words, what the answer should be

to it from the testimony, being governed by the rules laid down in the general instructions for weighing testimony. Then write the answer, then take up another one and another one, and so on until you finish them. I might say to you now that in case you agree upon a verdict and agree upon the special findings before morning, you may enclose them, your verdict and the special findings and other papers that the court has submitted to you, in an envelope, seal it up and give it to your foreman and separate. Bring the verdict and return into court—when would you say, tomorrow morning, Mr. Young, or in the day?

By Mr. YOUNG: Tomorrow is Sunday.

By the COURT: Yes sir, but we can receive a verdict in this case on that day. I suppose if you want to get away it will probably help you out. Gentlemen of the Jury, notify the court and I will convene for the purpose of receiving the verdict tomorrow. I speak of this now partially for the benefit of foreign counsel and partially because I may have to leave here before Monday morning and I can-ot leave until I get the verdict of the jury, because no other judge can sit here and receive it. If you should not agree, of course, you will be in session all day tomorrow and all night tomorrow night. That is all. Have you had your suppers?

By a JUROR: No sir; if we had our suppers, maybe we would be in better order.

By the COURT: Your suppers have been ordered. You may retire. Now, gentlemen, there is a question arising in the mind of the court, some of these interrogatories might have to be re-submitted or something like that, and if all those things can be agreed to by consent of counsel, I will receive the verdict.

403 By Mr. NOAH: Well, we will agree.

By Mr. SWINDALL: It is consented to on the part of the plaintiff.

Thereafter at half past ten o'clock a. m., May 1, 1904, the jury in the above entitled cause returned into court.

Counsel for plaintiff and defendant present.

By the COURT: Gentlemen on the Jury, have you agreed upon a verdict?

By FOREMAN: We have.

By the COURT: Pass it to the court. The Clerk will read the verdict and the special interrogatories.

Here Clerk reads verdict and special interrogatories.

By the COURT: Gentlemen of the Jury, is this your verdict?

JURORS: Yes sir.

By the COURT: So say you all. Gentlemen of the jury, are these your answers to the special interrogatories?

JURORS: Yes sir.

By the COURT: So say you all.

By Mr. NOAH: We think, if the court please, that that fourth question should be answered or resubmitted.

By the COURT: The jury says there is not sufficient evidence to determine.

By Mr. NOAH: Well, in order to save the record, the defendant moves the court to re-submit to the jury question number four,—is that it. No, it is not four, it is five. Question number five of the special interrogatories, which reads as follows: How many Edmisson cattle did J. F. Bryson ship from Curtis to Kansas City?

By the COURT: The Court will decline to re-submit the special interrogatory.

By Mr. NOAH: To which ruling of the court the defendant excepts.

404 By the COURT: The verdict will be received and recorded as the verdict in this case, together with the special interrogatories, and you will be discharged, gentlemen of the jury, from further consideration in the case and excused until tomorrow morning at nine o'clock.

Here Court adjourned until nine o'clock a. m. May 2, 1904.

Said verdict and special interrogatories submitted to the jury by defendant are in words and figures as follows, to wit:—

405 Court convened Sunday May 1st. 1904 at 9 o'clock A. M.

361.

R. C. EDMISSON
vs.
DRUMM FLATO COMMISSION CO.

Comes now the jury into court in charge of their sworn bailiff. And having been called by the clerk and found to be all present they return into court their verdict herein which is in words and figures as follows, to wit:

In the District Court of Woods County, Territory of Oklahoma.

R. C. EDMISSON, Plaintiff,
vs.
THE DRUMM FLATO COMMISSION COMPANY, Defendant.

Verdict.

We the jury, duly empaneled and sworn to try the issues in the above entitled cause, do upon our oaths find for the plaintiff R. C. Edmisson, and assess his damages at the sum of Seven Thousand Four Hundred thirty six and 06/100 ($7436.06) Dollars.

J. H. WYMAN, *Foreman.*

And now the court orders that the above be filed, recorded and accepted as the verdict in this case.

And now the Court discharges the jury from further consideration in this case.

And now Court adjourns until May 2nd. 1904 at 9 o'clock. A. M.

406 In the District Court of Woods County, Territory of Oklahoma.

361.

R. C. EDMISSON, Plaintiff,
vs.
THE DRUMM FLATO COMMISSION COMPANY, Defendant.

Verdict.

We, the jury duly empaneled and sworn to try the issue in the above entitled case, do upon our oaths, find for the plaintiff, R. C. Edmisson, and assess his damages at the sum of Seven Thousand Four Hundred thirty six and 06/100 ($7436.06) Dollars.

J. H. WYMAN, *Foreman.*

Endorsements: Edmisson *vs.* Drumm Flato. J. — Page 407. Filed May 1, 1904. E. P. Kelly, District Clerk. Ent.

407 In the District Court of Woods County, Oklahoma Territory.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM FLATO COMMISSION COMPANY, Corporation, Defendant.

Special Interrogations to Jury by Defendant.

Q. 1. After November 22, 1899, how many cattle did the Drumm-Flato Commission Company receive of the Edmisson brand?

Ans. 2284 head of cattle.

Q. —. Who paid the expenses of gathering the Edmisson cattle gathered after November 22, 1899?

Refused.

Ans. —.

Q. 3. Who gathered the Edmisson cattle gathered after November 22, 1899?

Ans. Edmonson, Bryson and Gober.

Q. 4. Did plaintiff, Edmisson, gather and deliver to the Drumm Flato Commission Company or its agents any cattle after November 22, 1899? If so, how many?

Ans. Yes helped gather and deliver 1710 head of cattle.

Q. 5. How many Edmisson cattle did J. F. Bryson ship from Curtis to Kansas City?

Ans. Not sufficient evidence to determine.

Q. 5. How many Edmisson cattle did J. R. Goeber gather?

Ans. 574 head of cattle.

If the Jury find for the plaintiff the above questions are to be answered by them.

J. H. WYMAN, *Foreman.*

408 Endorsements: Edmisson *vs.* Drumm-Flato. Filed May 1, 1904. E. P. Kelly, District Clerk. Ent.

409 Echibit B, offered in evidence in the above entitled cause, is in words and figures as follows, to wit:—

EXHIBIT B.

DRISCOL, OKLAHOMA, *Nov.* 24, 1899.

Drumm Flato Com. Co., Kansas City, Mo.

GENTS: After leaving your city that night I looked at our contract and read carefully. I found that one part of our contract was not put in, where you agreed that if I turned all the cattle that we could find on range and failed to find number of cattle mentioned in contract, that you would cancel all my notes and indebtedness and turn over to me. Now I got home last night, Mr. Bryson will be here this morning, will go to work tomorrow to getting them together and will work as fast as possible to not jam or hurt cattle and will ship to your advice. Please let me know at once if I am correct. We have had a great deal of rain here and weather still looks gloomy and will probably be bad to work, but I will work under Mr. Bryson's advice until we can gather all the cattle.

Yours Resp'y, R. C. EDMISSON.

410 Instructions asked by defendant are as follows, to wit:

411 The court instructs the jury that under the pleadings and uncontradicted evidence in this case the plaintiff on December 19, 1898, gave to the defendant two certain chattel mortgages both duly witnessed and filed for record, one being on 3340 head of cattle branded x 2 bars, securing the sum of $37307.92 in notes given by plaintiff to defendant, and one being on 2170 head of cattle branded with one or more of the following brands.—55, 55 bar, J [illegible]., and securing the sum of $20367.16 in notes given by plaintiff to defendant, both of which mortgages read in evidence; that said notes became due prior to November 22, 1899.

That by the terms of said mortgages the defendant was entitled to the possession of all the cattle described in said mortgages and defendant had the legal right by the terms of said mortgage to enter upon the premises of the plaintiff or any place where the said cattle could be found and take possession of said cattle, and by the terms of said mortgages defendant had the right to sell said cattle.

That on November 22, 1899, plaintiff and defendant entered into the contract read in evidence, whereby plaintiff agreed to deliver to defendant 1900 head of cattle on which defendant held said mortgages, and if 2100 head of said cattle could be found, then the plaintiff was to deliver to defendant 2000 head of said cattle and upon such delivery being made according to said contract, defendant was to deliver up the notes given by plaintiff and cancel plaintiff's indebtedness to defendant.

Endorsed: Instructions asked by Defendant. Botsford, Deatherage & Young, and H. A. Noah, Att'ys for Defendant.

412 The Court instructs the jury that the burden is upon plaintiff to prove by a preponderance of the evidence that plaintiff fully complied with the contract of November 22, 1899, read in evidence, be delivering to defendant at least nineteen hundred head of cattle, and in case 200 head of cattle more were found by plaintiff then plaintiff was to deliver to defendant 2000 head of cattle on which defendant had mortgages and unless you believe such facts have been proved by a preponderance of the evidence on the part of the plaintiff you must find your verdict for defendant.

By a preponderance of the evidence is not meant the greater number of witnesses, but the greater weight of credible testimony in the case.

Endorsed: Instructions asked by defendant. Botsford, Deatherage & Young, and H. A. Noah, Attorneys for D'f't.

413 The Court instructs the jury that by the terms of the contract read in evidence of November 22, 1899, the plaintiff was required to deliver to defendant at least 1900 head of cattle and in case 200 head more were found, the plaintiff was to deliver to defendant 2000 head of cattle on which defendant had mortgages and that the cattle so delivered must have been free from any other lien, taxes or incumbrances, except the liens of defendant's mortgages thereon, and if you believe from the evidence that plaintiff did not deliver to defendant the number of cattle required by said contract, free from taxes, liens or other incumbrances, your verdict must be for defendant.

Endorsed: Instructions asked by defendant. Botsford, Deatherage & Young, and H. A. Noah, Att'ys for D'f't.

414 The court instructs the jury that if after the contract of November 22, 1899, was made the plaintiff Edmisson became unable to, or refused to gather and deliver the cattle mentioned in said contract that such inability or refusal amounted to a rescission of said contract.

Endorsed: Instructions asked by defendant. Botsford, Deatherage & Young, and H. A. Noah, Att'ys for Defendant.

415 The court further instructs the jury that upon failure of plaintiff to deliver the cattle mentioned in agreement of November 22, 1899, to defendant, if you find that such failure occurred, that the defendant was entitled to choose either of two courses, it might elect to proceed under the contract charging the expenses of gathering and getting possession of the cattle to plaintiff and taking a sufficient number in addition to contract number to pay such expense; or, it might consider the contract broken by plantiff's failure to deliver and proceed to secure possession under its mortgages and sell the cattle thereunder, in which latter case it would have the right to take enough cattle if they were to be found, to pay the bal-

ance due it, principal and interest and all costs of gathering and selling the same.

Endorsed: Instructions asked by defendant. Botsford, Deatherage, & Young and H. A. Noah, Att'ys For Def't.

416 The court instructs the jury that it is necessary that the plaintiff to be successful, shall prove every material allegation of his petition by a preponderance of the evidence and that one of the material allegations of the petition is the delivery of the cattle mentioned in the contract of November 22, 1899, and if you find either that the plaintiff has failed to prove such delivery or has admitted such failure then you must find for the defendant.

Endorsed: Instructions asked by defendant. Botsford, Deatherage & Young, and H. A. Noah, Att'ys for Def't.

417 The Court instructs the jury that if you believe from the evidence that plaintiff failed or refused to deliver to defendant the cattle covered by the mortgages read in evidence according to the terms of the contract read in evidence, and that defendant gathered the cattle at defendant's expense, then you must find for defendant.

Endorsed: Instructions asked by defendant. Botsford, Deatherage & Young, and H. A. Noah, Att'ys for defendant.

418 The court instructs the jury that under the pleadings and the evidence in this case, the plaintiff cannot recover and your verdict must be for defendant.

Endorsed: Instructions asked by defendant. Botsford, Deatherage & Young, and H. A. Noah, Att'ys for Def't.

419 In the District Court of Woods County, Territory of Oklahoma.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM FLATO COMMISSION COMPANY, Defendant.

Stenographer's Certificate.

I, S. T. Jocelyn, hereby certify that I am the duly appointed, qualified and acting stenographer for the above named court; that as such stenographer, I took in shorthand the testimony and other proceedings on the trial of said case; that the typewritten transcript hereto attached is a true, correct, full and complete transcript of such stenographic notes and contains all of the testimony adduced together with objections, rulings, exceptions and other proceedings on the trial of said cause.

S. T. JOCELYN.

420 In the District Court of Woods County, Oklahoma Territory.

R. C. EDMISSON, Plaintiff,
vs.
THE DRUMM FLATO COMMISSION COMPANY, a Corporation, Defendant.

Journal Entry.

Now on this 27th. day of April, 1904, the same being one of the judicial days of the April, 1904, term of the District Court of Woods County, Oklahoma Territory, this cause came regularly on for trial, the plaintiff appearing in person and by his attorneys, Chas. Swindall, Snoddy and Son, and D. P. Marum; and the defendant by its officers, and its attorneys, O. G. Young and H. A. Noah, and both parties announce ready for trial, a jury was regularly empannelled and sworn to try the said cause; and said cause was taken up and submitted to the jury and the trial of said cause was proceeded with from day to day until the 30th. day of April, 1904, when said cause was finally concluded and submitted to the jury for their deliberation; and on the 1st. day of May 1904, the jury having announced that they had agreed upon a verdict, were brought into court, and by consent of both plaintiff and defendant, waiving all irregularities said verdict is received by the court and read by the clerk. The verdict returned into court by the jury is in words and figures, as follows; to wit:—

In the District Court of Woods County, Territory of Oklahoma.

R. C. EDMISSON, Plaintiff,
vs.
THE DRUMM FLATO COMMISSION COMPANY, a Corporation, Defendant.

Verdict.

We, the jury duly empannelled and sworn to try the issues in the above entitled case, do upon our oaths, find for the plaintiff,
421 R. C. Edmisson, and assess his damages at the sum of Seven Thousand Four Hundred Thirty Six and 06/100 Dollars.
J. H. WYMAN, *Foreman.*

And now on this 2nd. day of May 1904, the same being one of the Judicial days of the April 1904, term of the said Court, on motion of the plaintiff for judgment upon said verdict, it is adjudged by the court, that the said plaintiff R. C. Edmisson have and recover of and from the defendant, The Drumm Flato Commission Company, the sum of Seven Thousand Four Hundred thirty six and six one hundredths Dollars and the costs of this action taxed at Two

Hundred Twenty seven Dollars and No Cents, and that execution issue therefor.

J. L. PANCOAST, *Judge.*

O. K. Botsford, Deatherage and Young and H. A. Noah, Att'ys for Def't.

Endorsements: R. D. Edmisson *vs.* The Drumm Flato Commission Co. Journal Entry. Filed May 11 '04. E. P. Kelly, Clerk. Ent Ent.

422 And thereafter and on May 2, 1904, the defendant in the above entitled cause filed its motion for new trial in said action, which motion for new trial is in words and figures as follows, to wit:—

423 In the District Court of Woods County, Oklahoma Territory.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM FLATO COMMISSION COMPANY, Corporation, Defendant.

Motion for New Trial.

Comes now the defendant, the Drumm Flato Commission Company, a corporation, and moves the court for a re-examination and new trial of the issues of the above entitled action for the following causes affecting materially the substantial rights of the said defendant, to wit:

First. Because of irregularities in the proceedings of the court and jury by which the said defendant was prevented from having a fair trial, in this to wit: Because of the failure and refusal of said jury to answer interrogatory number five propounded by the said defendant and submitted to the said jury by the said court, and because of the refusal of the said court to re-submit on motion of said defendant the said question to the said jury for answer, to which refusal the said defendant at the time duly excepted and still excepts.

Second. Because of the misconduct of the jury trying the said cause in refusing to answer the said interrogation number five propounded by the said defendant.

Third. Because of the excessive amount of the damages, appearing to have been given under the influence of passion or prejudice.

Fourth. Because of error in the assessment of the amount of recovery, same being too large.

Fifth. Because the verdict in the said action is not sustained by sufficient evidence.

Sixth. Because the verdict of the said action is contrary to law.

424 Seventh. Because of errors of law occur-ing at the trial and duly at the time excepted to by said defendant and to which errors the said defendant still excepts.

Eighth. Because of error in the instructions of the said court affecting materially and adversely the substantial rights of the said defendant.

Ninth. Because of error in instructions numbers 7 and 8 of said court relating to interest, instructing the said jury to assess interest if it found for plaintiff, instead of leaving the question of assessment of interest to the discretion of the jury.

For all of which reasons the defendant moves the court for a new trial and re-examination of the issues in the said action.

DRUMM-FLATO COMMISSION COMPANY,
CORPORATION, *Defendant,*
By BOTSFORD, DEATHERAGE & YOUNG AND
H. A. NOAH, *Its Attorneys.*

Endorsements: R. C. Edmisson *vs.* Drumm-Flato Commission Company, Corporation. Motion for New Trial. Filed May 2, 1904. E. P. Kelly, District Clerk. Ent. ent.

425 Court convened Wednesday May 11th, 1904, at 9 o'clock A. M. pursuant to adjournment.

Present the Hon. J. L. Pancoast, sole presiding Judge, E. P. Kelly, Clerk, D. C. Oates, Sheriff, S. T. Jocelyn, Stenographer, and N. W. McGruder, Crier.

Public proclamation of the opening of court having been announced, proceedings were had as follows, to wit:—

361.

R. C. EDMISSON
vs.
DRUMM FLATO COMMISSION CO.

Comes now this cause on for hearing upon the defendant's motion for a new trial, filed her-in. And the Plaintiff being present by his attorney Snoddy and son and D. P. Marum and the defendant being present by its attorney H. A. Noah, the court hears the arguments of counsel for a new trial and being fully advised in the premises, overrules the said motion. To which ruling of the Court, the defendant excepts.

And now the Court grants the defendants sixty days to make and serve a case made for the Supreme Court. And the Plaintiff twenty days to suggest amendments thereto. Same to be settled and signed upon five days' notice.

426 In the District Court of Woods County, Territory of Oklahoma.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, Defendant.

We hereby accept service of the above and foregoing case made this 2nd day of July, A. D. 1904.

SNODDY & SON,
C. W. SWINDALL, &
D. P. MARUM,
Attorneys for Plaintiff.

Filed Feb. 24, 1905.

BENJ. H. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

427 In the District Court of Woods County, Territory of Oklahoma.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, Defendant.

The above and foregoing case-made contains a true and correct statement of all the pleadings, motions, orders, affidavits, findings, evidence and proceedings upon which judgment therein was rendered.

BOTSFORD, DEATHERAGE AND YOUNG, AND
H. A. NOAH, *Attorneys for Plaintiff in Error.*

Filed Feb. 24, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court.

428 In the District Court of Woods County, Territory of Oklahoma.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, Defendant.

Notice.

To R. C. Edmisson, and Chas. Swindall and Snoddy & Son, his attorneys of record:—

You and each of you are hereby notified that the above and foregoing case-made will be submitted to Hon. J. L. Pancoast, Judge of

said Court, for signing and settling on the 29th day of October, A. D. 1904.

BOTSFORD, DEATHERAGE & YOUNG, AND
H. A. NOAH, *Attorneys for Said Defendant.*

Filed Feb. 24, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court.

Service of the above notice is hereby acknowledged this 25th day of October, A. D. 1904.
The five days' notice is hereby waived.

SNODDY & SON, AND
CHAS. SWINDALL, &
D. P. MARUM,
Attorneys for Plaintiff.

Filed Feb. 24, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court.

429 In the District Court of Woods County, Territory of Oklahoma.

R. C. EDMISSON, Plaintiff,
vs.
DRUMM-FLATO COMMISSION COMPANY, Defendant.

Certificate of Judge.

I, J. L. Pancoast, Judge of the District Court for the Sixth Judicial District, Territory of Oklahoma, of which district Woods County is a part, hereby certify that the above and foregoing case made was by attorneys for defendant presented to counsel for plaintiff within time; that all suggestions of amendments contained therein were duly made within time; that the said case-made contains a full, complete, true and correct transcript of all the evidence offered on the trial of said cause, together with all motions, objections, exceptions and rulings and other proceedings had therein; and I now sign and settle the same as a full, complete, true and correct case made in said above entitled cause, and order the same filed as a part of the records of this case.

Done at chambers in Alva, this 29" day of Oct. A. D. 1904.

[SEAL.] J. L. PANCOAST, Judge.

Attest:
E. P. KELLY, *Clerk.*

Filed Feb. 24, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court.

430 Case made endorsed on the back: District Court Woods County. Case made. R. C. Edmisson *vs.* Drumm Flato Commission Co. And Petition in Error and Waiver of Summons. Filed Oct. 29, 1904. E. P. Kelley, District Clerk.

431 And afterward, at the June, 1905, Term of said Supreme Court, on the Sixth day of June, 1906, the following proceeding was had in said cause, to wit:

1684.

DRUMM-FLATO COMMISSION COMPANY, Plaintiff in Error,
vs.
R. C. EDMISSON, Defendant in Error.

Ordered by the Court, that this cause be now taken on record and briefs.

432 And thereafter, at the June, 1906, Term of said Supreme Court, on the Fifth day of September, 1906, the following proceeding was had in said cause, to wit:

1684.

DRUMM-FLATO COMMISSION COMPANY, Plaintiff in Error,
vs.
R. C. EDMISSON, Defendant in Error.

And now this cause comes on for final determination and decision by the court upon the record and briefs submitted therein.

And the Court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the District Court of Woods County, Territory of Oklahoma, in this cause, should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the Court, that the judgment of the Woods County District Court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by Hainer, J. All the Justices concurring except Pancoast, J., who presided in the trial of the cause in the Court below, not sitting.

Which opinion reads in words and figures as follows, to wit:

433

No. 1684.

In the Supreme Court of the Territory of Oklahoma, June Term, 1906.

Filed September 5, 1906.

DRUMM-FLATO COMMISSION COMPANY, Plaintiff in Error,
v.
R. C. EDMISSON, Defendant in Error.

Syllabus.

1. Where a contract for the sale of personal propery is silent as to the place of delivery, the law will presume that the property is to be delivered at the point where it is located at the time the contract is entered into.
2. It is not error to exclude entries in books of account, where such entries do not relate to the transaction which is the subject of inquiry, since under such circumstances they are immaterial.
3. There was no error in excluding the testimony of the bookkeeper showing the entries made from the scale tickets delivered to him by the defendant's employé at the stock yards at Kansas City some days after the delivery of the cattle to the agent of the company in Oklahoma.
4. In an action for the wrongful conversion of personal property, under the provisions of our statute a party is entitled, as a matter of right, to recover interest from the date of the conversion.
5. Where a special interrogatory is submitted to a jury, it should be clearly and concisely stated, so that the jury can give a direct answer thereto.
6. A special interrogatory that is not material, or that has a tendency to confuse or mislead the jury, should be refused.
7. Prejudicial remarks of the court during the course of the trial must be excepted to at the time, and such objections cannot be raised for the first time in the appellate court.

Error from the District Court of Woods County.

J. L. Pancoast, Trial Judge.

Affirmed.

Botsford, Deatherage & Young, and H. A. Noah, for plaintiff in Error.

Snoddy & Son, Charles Swindall and D. P. Marum, for defendant in error.

Statement of the Case.

This was an action brought in the District Court of Woods County by R. C. Edmisson against the Drumm-Flato Commission Company,

for the wrongful conversion of 410 head of cattle, whereby the plaintiff claims he has sustained damage in the sum of $8,000.00.

The issues and the facts in this case are fully stated in the former decision of this court, in the case of Edmisson v. Drumm-Flato Commission Company, 13 Okla., 440, and need not be restated here.

The cause was submitted to a jury, both parties having introduced considerable testimony to sustain their respective contentions, and a verdict was returned in favor of the plaintiff, assessing the damages in the sum of $7,436.06. The jury returned also with their general verdict answers to special interrogatories which were submitted at the request of the defendant. These questions and answers are as follows:

"Q. 1. After November 22, 1899, how many cattle did the Drumm-Flato Commission Company receive of the Edmisson brand?

Ans. 2284 head of cattle.

Q. 2. Who paid the expenses of gathering the Edmission cattle gathered after November 22, 1899?

Ans. Refused.

Q. 3. Who gathered the Edmisson cattle gathered after November 22, 1899?

434 Ans. Edmonson, Bryson and Gober.

Q. 4. Did Plaintiff, Edmisson, gather and deliver to the Drumm-Flato Commission Company or its agents any cattle after November 22, 1899? If so, how many?

Ans. Yes helped gather and deliver 1710 head of cattle.

Q. 5. How ma-y Edmisson cattle did J. F. Bryson ship from Curtis to Kansas City?

Ans. Not sufficient evidence to determine.

Q. 6. How many Edmisson cattle did J. R. Goeber gather?

Ans. 574 head of cattle."

The court approved the general verdict, and rendered judgment in accordance therewith. Motion for a new trial was duly filed and overruled, exception saved, and the defendant appeals.

Opinion of the court by

HAINER, *J.*:

The first error assigned and argued by the plaintiff in error is that there is no substantial evidence in the record to support the verdict. This contention cannot be sustained. A careful reading and examination of the entire record fully convinces us that the plaintiff established his cause of action by a clear preponderance of the evidence, and that the general verdict and the answers to the special questions submitted are abundantly sustained by the evidence.

In the former opinion of this court, Mr. Chief Justice Burford, in passing upon this question, uses the following language:

"Treating the contract as valid and enforceable, does the evidence show a sufficient compliance or effort to comply with it on the part of Edmisson? As against the demurrer, the evidence shows that he delivered to the company 1,710 head of these cattle, and then

rounded up and held out 350 additional head, and tendered them to the agent of the company. This was all that he was required to do by the agreement, and was all he could do under the conditions existing. The company took and appropriated the 1,710 head, but declined or at least failed to accept the remainder offered, and subsequently directed Gober to seize all he could find, which he proceeded to do, and turned them over to the commission company or accounted to them for them. We think this evidence sufficient to entitle the plaintiff to a judgment in his favor. What the amount of the damage is, must be left to the jury."

In the second assignment of error it is urged that the court erred in rejecting the books of account kept by the defendant, showing the number of Edmisson cattle sold by the defendant in December, 1899. The contract, which was the basis of this action, contained the following provision:

"That said R. C. Edmisson, the second party, hereby agrees to deliver to Drumm-Flato Commission Company Nineteen Hundred (1900) head of cattle as they run on the range, (provided the same can be found to make this number of head) of various ages and on which said Drumm-Flato Commission Company hold a chattel mortgage."

Pursuant to this contract, the defendant company, in the latter part of November, sent its agent, Bryson, from Kansas City to the plaintiff's ranch in Woods County, Oklahoma, to gather, count, and ship the cattle to Kansas City. It further appears that Bryson, the agent of the company, employed several men to assist him in gathering the cattle on the plaintiff's ranch, in which work they were engaged about eight days.

The plaintiff testified that he and the company's agent, Bryson, together with a number of persons employed by Bryson to assist him, rounded up 1710 head of cattle, and that that number of cattle were counted and tallied through a gate west of the plaintiff's house about three-quarters of a mile. That the cattle were counted at that place in the presence of Bryson, Black, the Bollman brothers, Ed. Edmisson, and himself. That after the cattle were counted, Bryson placed them in what was known as the Harrington and Roberts pasture. He states that the count was made by himself and Bryson and by Black, who was employed by Bryson. That the count was correct, and was satisfactory to Bryson, who made a memorandum thereof in a book of account, and turned the cattle into the Harrington
435 and Roberts pasture.

Edmisson further testified that on the day that Bryson shipped the cattle from Curtis, he, Edmisson, gathered three or four hundred head of cattle additional, for the purpose of taking care of them until Bryson, the agent of the defendant company, could return and receive the balance of the cattle under the contract. That he went to Bryson and informed him that he was ready to deliver the balance of the cattle. That Bryson stated that he would return to receive the balance of the cattle as soon as he made that shipment.

Black, the employé of Bryson, clearly corroborates the testimony of Edmisson, and testifies that he assisted in gathering the cattle and

rounding them up, and that the count took place at the gate, in the presence of Bryson, as testified to by Edmisson. That 1710 head of cattle were counted. That he and Bryson and Edmisson compared counts, and they agreed as to the correctness of the number, to-wit, that there were 1710 head of cattle. That after the cattle were counted, they were delivered to Bryson, and then they were turned loose until the next morning in the Harrington pasture, when they were again rounded up, and driven by Bryson and his employés to Curtis station.

Bryson, on this point, testified, in substance, that about four days after the contract had been signed in Kansas City he went to the plaintiff's ranch, and employed several men to gather the cattle. That it took about eight days to gather and round up the cattle. That he did not count the cattle at the gate, as testified to by the plaintiff and his witnesses, but that they were counted in the stock yards at Curtis; and that, according to his count at Curtis, there were 1556 head, including cows and calves.

The court permitted the defendant to show the number of cattle that were shipped at various times from Curtis, Oklahoma, including these cattle in controversy, as well as former shipments, and also permitted the employé of the defendant company at the stock yards at Kansas City to testify as to the number of cattle that were received at that point; but excluded the testimony of Burnett, the bookkeeper of the defendant company, as to what the books showed in reference to the number of cattle that were received under this contract, and as shown by the scale tickets of Rooney.

Bryson also testified that while he was gathering and rounding up the cattle he made various counts, and made a memorandum of the same; and that the actual count took place at Curtis station, and that he made a memorandum of it in his book at the time. The defendant did not attempt to offer these memorandums in evidence, or to show that the entries in the books at Kansas City were made therefrom, but attempted to show the number of cattle that were received, as shown by the scale tickets that were delivered by Rooney, the employé of the company at the stock yard in Kansas City, to its bookkeeper, Burnett. Manifestly, the memorandum that related to the transaction as to the number of cattle that were delivered by Edmisson to the agent of the company, was that kept by Bryson where the count took place, at the point of the delivery of the cattle. Had such a memorandum been entered upon the books in Kansas City, it would have been clearly competent, as it related to the transaction and was a part of the *res gestæ*.

In this connection, it must be borne in mind that the contract did not provide where the cattle should be delivered, and was wholly silent upon that question. The presumption of law, therefore, was that the cattle were to be delivered where they were located at the time the contract was entered into. And this no doubt was the clear intention of the parties, because immediately after the execution of the contract the defendant company sent its agent to the pasture of the plaintiff, where the cattle were located, and at once began to gather the cattle for shipment to Kansas City. After the cattle were

delivered by the plaintiff to the agent of the defendant, the plaintiff had no further control over them. And it seems to us that any transaction between the employé of the defendant at the stock yards in Kansas City, and the bookkeeper of the defendant, a number of days after the deliv of the cattle by the plaintiff to the agent of the defenda company, did not relate to the trans-
436 action, and was therefore properly excluded, as not being material to the issues involved. And this ruling is not repugnant to the provisions of section 4277 of the statutes of 1893, which is as follows:

"Entries in books of account may be admitted in evidence, when it is made to appear by the oath of the person who made the entries, that such entries are correct, and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of the person who made the entries, in case of his death or absence from the county."

Nor do we think it is in conflict with the rule announced by this court in the case of Kesler *v.* Cheadle, 12 Okla., 489, nor with the decision of the Missouri Court of Appeals in the case of Drumm-Flato Com. Co. *v.* Gerlach Bank, 81 S. W., 503, which authorities are relied upon by the plaintiff in error for a reversal of the cause on that point.

If, under the terms of the contract, the plaintiff had been required to ship the cattle to the defendant company at Kansas City, and the plaintiff, pursuant to such agreement, had gathered and shipped the cattle direct to the stock yards at Kansas City, then the scale tickets and any entries made by the bookkeeper, Burnett, as to the receipt of the cattle at that point would certainly have been material and competent evidence, and it would have been error to exclude it. In that event the scale tickets, as well as the entries in the books would have related in the transaction of the delivery of the cattle, and would have been a part of the *res gestæ*. But in this case, the delivery took place at the plaintiff's pasture, where the cattle were received by the defendant's duly authorized agent. After the delivery of the cattle at that point, the plaintiff exercised no further control over them.

There is still a stronger reason why the ruling of the court should be upheld. The defendant did not produce the books in court, nor was the book or the original entries therein attached to the deposition of the witness Burnett. Hence we think it was clearly incompetent to attempt to prove the entries by permitting the deposition of the witness Burnett to be read to the jury as to the contents of the book We know of no rule of evidence that would permit a witness to state the entries or the contents of a book account, unless the books are lost or destroyed.

It follows that there was no error in excluding the testimony of the bookkeeper, showing the entries made from the scale tickets that were delivered to him by the defendant's employé, Rune, at the stock yards at Kansas City, some days after the delivery of the cattle to the agent of the defendant company.

It is next contended that the court erred in instructing the jury that if they found there was a conversion of the property, the plaintiff was entitled to recover the value thereof, with seven per cent. interest thereon from the date of the conversion.

Section 2640 of the Statutes of Oklahoma of 1893 provides as follows:

"The detriment caused by the wrongful conversion of personal property is presumed to be: First. The value of the property at the time of the conversion, with the interest from that time."

It is argued by the plaintiff in error that section 2615 is applicable to this case, and which section is as follows:

"In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud or malice, interest *am*y be given in the discretion of the jury."

We are unable to perceive how this section is applicable to a case of wrongful conversion of personal property, where the statute fixes the specific measure of recovery. In the case of a wrongful conversion of personal property, under the provisions of our statute, a party is entitled, as a matter of right, to recover interest from the date of the conversion, and it would be erroneous for the court to
437 submit an instruction that it rests within the discretion of the jury. The provision of the statute relied upon by counsel for plaintiff in error is not applicable to a wrongful conversion of personal property.

It is next assigned that the court erred in not requiring the jury to give a specific answer to interrogatory No. 5. There was no error in this ruling of the court. The question submitted was not material to the issues involved. After the cattle had been delivered to Bryson, the agent of the company, it became immaterial as to the number shipped by him from Curtis to Kansas City. The ultimate question for the jury to determine was the number of cattle delivered by the plaintiff to the agent of the company, and not the number of cattle shipped by Bryson. And, again, the question is indefinite and uncertain, in this, that it did not fix the specific time of the shipment, and hence it should have been refused by the court. Where a special interrogatory is submitted to a jury, it should be clear and concise, to the end that the jury can give a direct answer thereto, and that it may not have a tendency to confuse or mislead the jury.

In City of Lawton *v.* McAdams, 83 Pac., 429, where this court had this same question under consideration, it was held that:

"The object of the statute is to elicit material facts, and not mere fragments or items of evidence; hence interrogatories that are calculated to mislead, confuse, or harass the jury should not be submitted."

And moreover, the evidence disclosed that a large number of Edmisson cattle had been shipped to Kansas City, in various shipments. Bryson testifies that the total number of cattle shipped was 2578. There was no dispute on the part of the plaintiff as to the number of cattle that were shipped. The entire controversy was

as to the number of cattle that were delivered by the plaintiff to the agent of the defendant, and the number coverted after allowing the defendant all that it was entitled to under and pursuant to the contract.

The testimony of Bryson as to the number of cattle that were shipped from Curtis to Kansas City, was allowed to go to the jury as a circumstance tending to corroborate him as to the number of cattle that were delivered by the plaintiff to Bryson as the agent of the company. Likewise, the testimony of Rune, the employe of the defendant company at the stock yards at Kansas City, was allowed to go to the jury for the same purpose. Assuming that the jury had answered that 1556 head of cattle were shipped from Curtis to Kansas City, as testified to by Bryson, this would have been a mere circumstance tending to corroborate him, but could not have been decisive on the issue as to the number of cattle that in fact were delivered by the plaintiff to Bryson. And in answer to interrogatory No. 4, the jury specifically found that the plaintiff, Edmisson, helped to gather and deliver to Bryson, 1710 head of cattle. And this was the ultimate question of fact to be determined by the jury on this issue.

Finally, it is contended that the court erred, during the course of the trial, in commenting on portions of the evidence. We have carefully examined the record referred to by counsel for the plaintiff in error, and we are unable to find that any exceptions were taken to any remarks made by the court. Nor was this question raised on the motion for a new trial. Hence this assignment of error is not available. If counsel desired to avail themselves of any objectionable remarks or misconduct of the trial judge during the course of the trial, it was their duty to preserve an exception at the time. Such objections cannot be raised for the first time in the appellate court.

Finding no error in the record which would justify a reversal of the cause, the judgment of the court below is affirmed.

Vancoast, J., who presided in the court below, not siting; all the other Justices concurring.

438 In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

Certificate.

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the foregoing 437 pages, numbered from 1 to 437, inclusive are a full, true and complete transcript of the record and all proceedings in said Supreme Court in the case of Drumm-Flato Commission Company, Plaintiff in error, *vs.* R. C. Edmisson, Defendant in error, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Guthrie, this 20th day of October, A. D. 1906.

[Seal of the Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 20,433. Oklahoma Territory Supreme Court. Term No. 468. Drumm-Flato Commission Company, plaintiff in error, *vs.* R. C. Edmisson. Filed October 23d, 1906. File No. 20,433.

FILED.
JAN 31 1908
JAMES H. McKENNEY,
Clerk.

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1907.

DRUMM-FLATO COMMISSION COMPANY, *Plaintiff in Error,*
vs.
R. C. EDMISSON, *Defendant in Error.*
No. 139.

In Error to the Supreme Court of Oklahoma Territory.

Additional Citation of an Authority for Plaintiff in Error.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE, AND
ODUS G. YOUNG,
Attorneys for Plaintiff in Error.

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ADDITIONAL CITATION OF AN AUTHORITY FOR PLAINTIFF IN ERROR.

On this January 27, 1908, counsel for plaintiff in error discovered the following decision, given by the Supreme Court of Oklahoma, which is directly in point on the question of the admissibility of the book entries in this case. We refer to the case of *Faut* v. *Campbell, et al.*, 8 Oklahoma Reports, page 586, l. c., 592.

Commencing at the top of page 592 and extending to the top of page 594, the Supreme Court of Oklahoma, in said case, in its opinion therein, used the following language:

And this brings us to a consideration of the second assignment of error, which we think material in this case, to-wit, the ruling out of the evidence by the court of the statement marked "Exhibit A," attached to the deposition of David B. Brooks, who was the bookkeeper of Fish & Keck Company. The effect of the first error assigned in this case (and which the court sustains) upon the verdict in this case, depends largely upon the disposition of this second assignment of error. If this assignment of error is not well taken, the other is certainly immaterial; that is, if the plea of payment is properly and legally sustained, and the verdict of the jury is correct upon this, then it is immaterial whether the defendant Stovall authorized the defendant Campbell to sign his name to the notes in question or not, and in this particular the dealings and business transactions between the defendant Campbell and the firm of Fish & Keck Company, so far as such transactions or dealings show payments on, or in any way affect the notes in question, constitute a very material part of this case. The record shows that the deposition of the witness Brooks was regularly taken. This exhibit was properly identified, and by the testimony of said witness was proved to be a true and correct copy of the books of Fish & Keck Company, showing the condition of the account of the defendant Campbell with that firm during the period when the payments are said to have been made on those notes through said Fish & Keck Company. It is further shown by the evidence that the books of the firm of Fish & Keck Company were outside and beyond the jurisdiction of this court, so they could not have been reached by process, being in the State of Missouri. As we understand it, it has always been the rule in taking depositions, where the question of the accuracy of an account is called in question, to attach to said depositions certified copies of said books, when, from their cumbersome character, or their remoteness from the court, or for any reason, it would be impracticable to have the originals produced; and we see nothing wrong

in this practice. This copy was regularly attached, marked as an exhibit, and became a part of the deposition in question. Now, the only objection that could have been raised to this exhibit was that it was not the original book of account, but the evidence shows that the original books of account were beyond the jurisdiction of this court, and could not have been brought in upon any order of this court, and said copy was the best evidence obtainable. Now, the objection that plaintiff's counsel has had no opportunity to examine the original books could easily have been obviated, if this objection had been made at the time of the taking of this deposition, as the proof shows that the original books were present at that time, and could have been examined if the request had been then made. We cannot say what the effect would have been if this exhibit had been admitted, or what the verdict of the jury would have been, but we do think it should have gone to the jury, and been considered by them for what it was worth, as it contained matters of vital importance in deciding the issues in this case, and we think it was error to rule it out.

Respectfully submitted,

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE, AND
ODUS G. YOUNG,
Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
JAN 20 1908
JAMES H. McKENNEY,
CLERK.

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1907.

DRUMM-FLATO COMMISSION COMPANY, *Plaintiff in Error,*
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In Error to the Supreme Court of Oklahoma Territory.

Reply Brief of Plaintiff in Error.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
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Attorneys for Plaintiff in Error.

—IN THE—

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In Error to the Supreme Court of Oklahoma Territory.

REPLY BRIEF OF PLAINTIFF IN ERROR.

I.

Some observations of counsel for defendant in error in their brief seem to call for a reply. At page 5 of their brief and points therein, counsel complain of our references to the facts shown by the record in this cause; we say the record, because no complaint is made, that we had gone outside of the record.

Indeed, counsel do not complain that the facts as recited in our statement, brief and argument, are not the facts of the case. Throughout our statement, brief and

argument, reference is made to the record in the case by the pages thereof, and it is not contended that the matters referred to are not in the record or are not truly stated.

One of the issues in the case is whether there is any evidence in the record to sustain the verdict of the jury. This involves a consideration of all the evidence, and an examination of the entire record.

Since the matters referred to by us in our statement and brief are all matters within the record, it is not seen how, in view of the breadth of one of the issues in the case, complaint can properly be made of our reference to the facts. Stated broadly, the issue in the case is whether the plaintiff or the defendant is the wrongdoer. The plaintiff charges the Commission Company with having wrongfully taken and converted to its own use cattle of the plaintiff, to which the Commission Company had no title. The Commission Company denies that it was the wrongdoer in the case. The testimony of Bryson showed that in November, before making the contract of November 22nd, 1899, he, at the instance of the Commission Company, went to plaintiff's ranch and counted the cattle at that time, on the plaintiff's ranch on which defendant held mortgages. His testimony is that he found 2,364 head, out of which he shipped 796 head at that time, leaving, according to his account, 1,568 head. The purpose of this testimony was to show that plaintiff did not and could not, deliver 1,710 head in December following. However, this testimony of Bryson that there were remaining on the ranch 1,568 head, when that fact was reported to the Commission Company, revealed the fact that there was a shortage of about two thousand head on the ranch. Of the entire mortgaged cattle, that is, taking the number of mortgaged cattle when the mortgages were given, and taking out the number of cattle received by the Commission Com-

pany in the meantime, there should have been two thousand more head than the 2,364 counted by Eryson in November.

It seems to us that reference to this fact, shown by the competent and uncontradicted evidence given by Bryson, was proper. Again, it appears from the testimony of Gober and Barclay that the cattle which they found in January and February, and in the spring of 1900, were scattered far and near, some of them in remote neighborhoods from the ranch of the plaintiff, instead of being found upon that ranch, as required by the mortgages.

Their testimony was introduced for the purpose of showing how many cattle they thus found. That testimony shows that Edmisson had scattered the cattle which they found, far and near away from his ranch, where, according to the terms of the mortgages they should have been. Counsel also complain of our reference to this fact, which is an undeniable fact in the case, shown by the uncontradicted evidence. We have, therefore, the undeniable facts that at one time two thousand head of these mortgaged cattle were missing away from Edmisson's ranch. Those cattle have never been found anywhere. It also shows that the cattle found by Gober and Barclay were taken away from the ranch and scattered far and near away from plaintiff's ranch. The mortgages given by the plaintiff to the Commission Company (pages 220 and 226 of the Record) contain this provision: "Said property to remain and to be kept on the premises above described until the full payment of the indebtedness hereinafter described, unless they are marketed or removed by or with the written consent of the Commission Company or its assigns." And it was in violation of the express provisions of the mortgages that said two thousand head of cattle and the cattle found by Gober and Barclay, were removed and concealed.

In quite a number of the states, statutes have been passed making it a criminal offense for a mortgagor to remove, conceal or otherwise dispose of mortgaged property. It is perhaps natural that counsel should want to put in the background, these undeniable facts of the case, and it is also perhaps natural that they should intemperately indulge in objections to the reference to these facts which appear from the record. We have contended in this case that the plaintiff, and not the Commission Company, was the wrongdoer, and we have contended that the evidence, considered as a whole, does not sustain the plaintiff's case.

The evidence in the case is practically undisputed. The testimony of the plaintiff, Black and Holman shows that the cattle were driven through a gate, that there was 1,710 head. That evidence stands undisputed. It is also undisputed that during the two days following, while the cattle were in the Harrington and Roberts' pasture, 150 head were cut out, which belonged to other ranchers whose cattle had gotten mixed with the Edmisson cattle on his open range. And the evidence of the number of cattle which were cut out while the cattle were in the Harrington and Roberts' pasture, is undisputed. And the testimony of Bryson that the number was 150, or not less than 150, is also undisputed. The testimony of Bryson and Runey that the number of Edmisson cattle shipped at Curtis, and received at Kansas City, was 1,556 head, is also undisputed. That is, there is no opposing testimony. So that, taking all of the testimony in the case, the evidence shows that the Bryson cattle was the number testified to by him and Rooney. As to the Gober cattle, the testimony that Gober counted the cattle, and that he gave the number making the total cattle received less than 1,900, is undisputed. The only testimony that can be

said to bear in a contrary direction is that of McFadden, who made a mere guess of the number of cattle in May or June, two months after the bringing of this suit, and here we have the strange fact that this suit was brought by plaintiff on April 7th, 1900, before he knew or claimed to have any knowledge of the number of cattle taken by Gober.

The plaintiff claimed immediately after making the contract of November 22nd, 1899, (page 256, Record) that the Commission Company, under said contract of November 22nd, was only entitled to such of Edmisson's cattle as might be found *on his range*. His contention seems to have been that his cattle, if not found on the range, were not within the scope of the contract of November 22nd.

That, perhaps, furnishes a reason why some of his cattle were distributed at points away from the range, and so being displeased with the gathering of the cattle by Gober, plaintiff brought this action before he guessed the number of cattle that Gober had gathered and collected.

II.

It is objected that the Commission Company does not have any right to rely upon the error of the refusal to admit in evidence the entries from the Commission Company's books, because, as is alleged, the specification and assignment of errors are insufficient, and in this connection rules 21 and 35 of this court are referred to. Rule 21 provides that the "specification" shall quote the full substance of the evidence admitted or rejected. The specification which is number two in our specification of errors, at page 35 of our statement, brief and argument, is as follows: "The court erred in rejecting the books of account kept by the defendant Commission Company, and showing the number of Edmisson cattle received and

sold by the Commission Company in December, 1899." We submit that said specification gave the *substance* of the evidence which was rejected by the trial court. The books of account under date of December 7th and 11th, 1899, showed the number of Edmisson cattle received in December, 1899. It certainly was not necessary that the account should be copied in the specification. All that the rule requires in the specification is that the specification shall give the *substance* of the evidence rejected, and it seems to us that we gave the substance of the evidence rejected in the specification when we described the rejected evidence, as the books of account kept by the Commission Company showing the number of Edmisson cattle received and sold by the Commission Company in December, 1899. What more might be asked, could be added to that specification, in order to make it complete as a specification of the substance of the evidence rejected?

The assignment of errors is at page 2 of the Record. The specification on this point is number four in the assignment of errors, and reads as follows: "The said Supreme Court of Oklahoma erred in holding that the books of account of the plaintiff in error were not admissible for the purpose of proving how many cattle plaintiff in error received from defendant in error after the making of the contract dated November 22nd, 1899."

Here again we submit that the substance of the evidence rejected is fully stated. Rule number 35 of this court, as to the assignment of errors, when specifying an error, as to the admission or rejection of evidence, is the same as rule 21 as to the specification of error on the same point. We submit that both the assignment of errors and specification of errors in the brief are in full compliance with said rules 21 and 35, in that, that they both state the substance of the evidence rejected by the

court. There are many cases where decisions have been given on objections that there were not any assignment of errors or specifications of error filed in the case, but we have not been able to find any case where such an objection as this to a specification and assignment so full and complete, was made. Nor do counsel cite any authorities.

In this connection it is also objected that both the assignment of errors and specification of errors are not complete because they do not quote the instructions which were sought to be held erroneous on this writ of error. This point upon the instructions is, that the court erred in peremptorily directing the jury to give interest in the sum of seven per cent in this action of trover.

We have not sought in this case to obtain a review of any instruction which requires inspection and examination to ascertain whether it laid down the proper rule or definition of liability as regards the case. Our proposition upon the question of the instruction is, that the court erred in peremptorily directing the jury, in the event they found for the plaintiff, to give damages by the way of interest at the rate of seven per cent on the value of the cattle taken. A mere statement of a peremptory instruction in the assignment, gives as full information as if the words in which the peremptory instruction was given are set out.

This specification is number three in the specification or errors, and at page 35 of our other statement and brief. That specification reads as follows: "The court erred in giving said instructions numbered seven and eight telling the jury in this action of trover to award Edmisson seven per cent interest on the amount of value found by the jury of the cattle taken."

Said rule 21 which provides that when an error is alleged as to the charge of the court, the specification

shall set out the part referred to *todium verbis,* whether it be in an instruction given or instruction refused, does not apply to this sort of a case. We suppose that if error is assigned or specification made in the brief, that the trial court erred in sustaining a demurrer to the evidence, or in giving a peremptory instruction to the jury to return a verdict for the defendant; and the fact is stated, that the court erred in giving a peremptory instruction to return a verdict for the defendant, that would be sufficient, without setting out the words in the record. The rule must have a reasonable and sensible construction. The purpose of the rule we suppose was and is, that where a court submits a case to a jury, and in a paragraph or clause, more or less lengthy, defines to the jury a rule applicable to the case or to any branch of it there, if error is assigned to such portion of the charge, the charge must be set out in full. But that provision in the rule does not apply to a case like this, where the court peremptorily directs the jury to either return a verdict for the plaintiff or defendant, or peremptorily directs the jury to award interest where the question of allowing interest should have been left to the discretion of the jury.

We submit, therefore, that the specification of errors and the assignment of errors also are sufficient.

The motion filed in the trial court for a new trial (pages 260, 261, Record) sufficiently specifies these points in accordance with the Oklahoma code. The seventh specification in the motion for a new trial is as follows: "Because of errors of law occurring at the trial and duly at the time excepted to by the said defendant, and to which errors said defendant still excepts." That is a sufficient specification in a motion for a new trial under the code, such as is in force in Oklahoma. The ninth specification in the motion for a new trial is as follows:

"Because of error in instructions numbered 7 and 8 of said court relating to interest, instructing the jury to assess interest if it found for plaintiff, instead of leaving the assignment of the question of interest to the discretion of the jury."

The petition in error in the Supreme Court of Oklahoma, by the Commission Company, may be found on pages 9 and 10 of the record. The specification in said petition in error in the Oklahoma Supreme Court, of the Commission Company, as to the rejection of its sale books, is number three, and is as follows:

"Said District Court on the trial of said cause erred specially in the exclusion from the consideration of the jury of the evidence offered by said Drumm-Flato Commission Company from its sale books of the original entries therein, showing the number of cattle shipped by said plaintiff to and sold by said defendant in the month of December, 1899."

The specification in the said petition in error in the Oklahoma Supreme Court, as to the peremptory direction to award interest, is number five, and is as follows:

"Said District Court erred specially in giving an instruction to the jury peremptorily to award interest in the event the jury should find a verdict against defendant on the value of the cattle which the jury should find were taken and converted by the defendant from the plaintiff."

It is thus seen that these errors were sufficiently assigned, first in the motion for a new trial, in the trial court, next in the petition in error in the Oklahoma Supreme Court, and next in the assignment of errors on suing out the writ of error to this court, and next in the specification of errors in the brief in this court of the Commission Company.

III.

It is next objected by defendant's counsel that evidence as to the entries in the sales book of the defendant

was not admissible because that evidence consisted of copies of the accounts and not the original evidence of the books themselves. This objection is that secondary evidence of the contents of books is inadmissible. These accounts appear at pages 204 and 205 of the printed record. They were exhibits A and B, returned into court as such exhibits, with the deposition of the bookkeeper who made the entries, John L. Burnett (page 180 Record).

The books themselves were produced in Kansas City, Missouri, where the Commission Company had its offices, on the taking of those depositions to be used in the District Court of Woods county, Oklahoma, in this case. The pages of the large books from which those copies were taken being 415 and 418, were identified by the witness bookkeeper, Burnett, and then at the bottom of page 183, Record, it appears that said pages of said book containing said accounts were offered in evidence in that deposition. Not only that, but copies of those entries on pages 415 and 418 of the said book being said exhibits A and B, returned with the deposition, were offered in evidence. This appears from page 185 of the Record. The entry regarding said copies is as follows:

"Copies of said entries offered in evidence by said "defendant on pages 415 and 418, respectively, given the "account sales of the cattle consigned by J. F. Bryson "to Drumm-Flato Commission Company, sold by said "Commission Company on December 7, 8 and 11, re-"spectively, are made by the notary public taking this "deposition from the sales book of said Drumm-Flato "Commission Company, and said copies are attached "hereto and made a part hereof, marked respectively, ex-"hibits A and B."

These copies were offered in evidence at the trial, but there was no objection either at the time of taking the deposition or at the trial that said copies were inad-

missible on the ground of being secondary evidence. There was objection to the oral testimony of Burnett as to the contents of the books, because the books themselves were the best evidence, but when at the trial the copies of the books marked exhibits A and B were offered in evidence the objection thereto was as follows (Record, page 185):

"By Mr. Snoddy: Well, we object to that as *incompetent, irrelevant and immaterial.*

By the Court: Object to what?

By Mr. Noah: Defendant offers copy of exhibit A.

By the Court: Yes, sir. What is your objection to this copy?

By Mr. Swindall: *Incompetent, irrelevant and immaterial.*

By the Court: The objection is sustained.

Mr. Noah: Sustained; defendant now offers exhibit B.

By Mr. Marum: Same objection.

The Court: Same ruling.

By Mr. Noah: Offers exhibit B attached to deposition of John L. Burnett.

By Mr. Swindall: Objected to as *incompetent, irrelevant and immaterial.*

By the Court: The court has ruled.

By Mr. Noah: The defendant excepts."

We submit that this generality of objection, that these copies were incompetent, irrelevant and immaterial, does not contain or include the objection that the copies were inadmissible on the ground of being secondary evidence. When the opinion of the Supreme Court of Oklahoma, in this case, is examined, it will be found that this objection now made, was not considered. Thus at page 269 of the record appears the following language in that opinion:

"There is still a stronger reason why the ruling of "the court should be upheld. The defendant did not pro- "duce the books in court, nor was the book *or the orig-*

"inal entries therein attached to the deposition of the "witness, Burnett. Hence we think it was clearly in- "competent to attempt to prove the entries by permitting "the deposition of the witness, Burnett, to be read to the "jury as to the contents of the book. We know of no "rule of evidence which would permit a witness to state "the entries or the contents of a book account, unless the "books are lost or destroyed."

This language of the learned Oklahoma Supreme Court shows that it did not pass on the objection now made for the first time, that copies of the accounts returned with the deposition are inadmissible on the ground of being secondary evidence. Judge Hainer, who wrote that opinion, evidently overlooked the fact that copies of the accounts in the original books were returned with the deposition of Burnett as exhibits A and B. The learned Justice says: "Nor was the *original entries therein attached* to the deposition of the witness, Burnett." This shows that the learned Judge overlooked the fact as already stated, that the accounts were filed and returned with the deposition, and the point that he ruled was that since neither the original books nor copies were returned into court, the deposition of the oral evidence of Burnett, the bookkeeper, as to the contents of the books, was inadmissible. So we have a case where the point is first made in this court that the copies of the books, although sworn to by the bookkeeper who made the entries, and attached by the officer, the notary public, to his deposition, was not evidence, because secondary. That point was not made in the trial court and was not the point passed on by the Supreme Court of Oklahoma.

Again in the chapter of the Oklahoma code of 1893, relating to evidence and depositions, being Article 16 of the code, is Sections numbers 375 and 376, which reads as follows: "Exceptions to depositions shall be in writing, specifying the grounds of objection, and filed

with the papers in the cause." Section 376: "No exception other than for *incompetency or irrelevancy* shall be regarded unless made and filed before the commencement of the trial."

We submit that under these statutes of Oklahoma this objection to the copies of the books should have been made at the time of taking the depositions, or at least before the coming on of the trial of the cause.

The above statute as it seems to us, only contemplates objections at the trial which go to the substance of the proof itself, and not to the form in which it is produced. The purpose of the statute is that if a mere formal objection like the objection now made is intended to be made, it should be made before the trial, so that if the objection is well taken it may be obviated by the party against whom the objection is made, producing the original evidence at the trial.

In Volume 13, Cyc. of Law and Pro., at page 1014, the rule on this subject is stated as follows, in the chapter there on depositions, namely:

"The time when an objection should be made as to the competency of a witness or evidence is a question which is usually regulated by statute or by rules of court, although it has been held in some jurisdictions that the objections to competency can be made when the deposition is produced, in the same manner as when the witness is tendered for examination on the trial, especially where the incompetency cannot be remedied by objection at the time of taking would be of no avail. Yet the better rule on this subject seems to be that objection to the competency of a witness should be made when the deposition is taken. Hence, such objection of incompetency is usually given at the time, and especially does this rule obtain where a party was present or had the right of cross examination and objections to the competency of the evidence were made for the first time at the hearing."

In the case at bar, as we have already seen, the objection was not made either at the taking of the deposi-

tions or by motion before the trial, nor was this objection that the evidence was secondary made at the trial. The only objection at the time of taking the deposition was that Burnett could not testify orally as to the entries in the books, because the books were the best evidence, but this is not an objection to making the proof by sworn copies of the entries returned with the depositions.

Again, at page 1019 of Vol. 13, Cyc. L. and P., it is said:

"Where objection is made to the form or nature of "the evidence contained in or attached to a deposition, "the time for taking such objection depends in a great "measure upon the nature of the objection and the situa- "tion of the parties prior to the time when the objection "is sought to be urged. Statements in a deposition which "are not legitimate evidence, like hearsay or opinion "evidence, may be objected to at the trial, but those "which are objectionable *merely because secondary evi- "dence, should be excepted to before trial.*"

Apart, however, from the foregoing considerations, copies of the accounts in this case, if timely objection had been made thereto, were admissible for the reason that the books of account in this case were in another state than the state or territory in which the trial was to take place. Therefore, according to the rules of evidence, it was competent in taking the deposition to produce the bookkeeper who made the entries in connection with the book, and prove by his sworn testimony the sworn copies returned as exhibits A and B, and the books as already stated being in the state of Missouri, those copies, therefore, became proper evidence.

Thus in the case of *Craig* v. *Russell*, 2 Harrington, (Del.) 353, it seems to be held that, "It is the practice to admit sworn copies when the plaintiff resides out of the state, unless the other side objects, in which case the party requiring the production of the books should give due notice to the other party."

See also Vol. 2, Wigmore on Evi., Sec. 1223.

So in the case of *St. Louis Ins. Co.* v. *Cohen*, 9 Mo. Rep., page 421 (l. c., 443), the Missouri Supreme Court there uses the following language:

"Some parts of a deposition were objected to as "being incompetent evidence, and exceptions were taken "to the reading of the sworn copy of the agreement, the "original of which appeared to be in the hands of indi-"viduals in the Territory of Wisconsin; the introduc-"tion of sworn copies stands on the same principal as "proof of the handwriting of the subscribing witness "who is beyond the court."

In 3 Mon., 532, parol evidence of the contents of a written partition of slaves was admitted as competent evidence on the ground that the paper was in the state of Virginia. The same doctrine is sanctioned in the case of *Bailey* v. *Johnson*, 9 Cow., 115; *U. S.* v. *Reyburn*, 6 Peters Rep., 352. The same rule is recognized in the case of *Todd* v. *Bishop*, 136 Mass., 386.

In that case depositions were taken in another state and the court adjudged as appears from the syllabus of the case that if the defendant in an action in answer to interrogatories filed by plaintiff, has stated that the purchase of shares of stock of a firm doing business in another state, the plaintiff is entitled to put in evidence the deposition of a member of the firm to the effect that no such transaction is shown by the books of the firm, although exhibits of the books are not annexed to the deposition. In the opinion at page 395, the court says:

"The books were beyond the jurisdiction of the court and it was not necessary to annex copies of all the books in order to show that there was any such entries in them."

This is clearly a distinct recognition of the rule that where depositions are taken in another state and books

of account are produced, the return of annexed copies of the books to the deposition is proper practice.

So again in the case of *Bank* v. *Conkey,* 4 Met. Rep., page 459, it was adjudged as follows:

"When a deposition is taken in another state under a commission and the deponent is inquired of respecting a lease written by a party to the suit, and is requested to annex such lease or copies thereof to his deposition, he is not bound to do either. The most that can be required of deponent in said case is to furnish such extracts from the lease received by him as relate to the subject of inquiry upon being tendered a reasonable charge for making such extracts."

That case is also a distinct recognition of the rule that where a deposition is taken in another state copies of exhibits instead of the originals may be produced and used in evidence.

In the case of *Martin* v. *Raigan,* 12 Cush., page 132, which was an action of assumpsit on book account, it appears that a deposition was taken at Albany, N. Y., and a copy of the items of the book account was annexed to the deposition. The objection was that the copy of the bill of items was made by the plaintiff's attorney. The Massachusetts Supreme Court, however, overruled this objection and held that the copy of the account was admissible.

See also:

Savings Company v. *Manhattan Ins. Co.,* 66 Ga., 446 (l. c., 460);

Howard v. *Ins. Co.,* 9 Bosworth, 645.

Oklahoma has a statute also that recognizes copies of books of account as evidence. At page 824 of the Oklahoma statute for 1893, Section 380, it is provided, that "either party or his attorney may demand of the adverse party an inspection and copy or permission to

take a copy of a *book*, paper or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein." And further provides under what circumstances the copy may be used as evidence.

IV.

Another point made by plaintiff's counsel at the bottom of page 30 of their brief, is that the case made was not properly certified in the trial court. The point is made that it is not recited in the body of the case made, that the case made contains all of the evidence. And it is urged that the court will not consider the evidence in this case for that reason. Of course, even if this objection were a sound one, this court could consider the point of the rejection of the books of account and the point as to the peremptory direction of the court to the jury to award interest instead of leaving the subject to the discretion of the jury, for the reason that the consideration of those points does not involve a review or examination of the evidence. However, we submit that the point is not well taken as to the evidence. The statutes of Oklahoma for 1893, on the subject of error in civil cases, at page 856, article 22, contains the following provision, being section 567:

"Sec. (4445) Sec. 567. The court or judge may, upon good cause shown, extend the time for making a case, and the time within which the case may be served, and may also direct notice to be given of the time when a case may be presented for settlement after the same has been made and served and amendments suggested shall be settled, certified and signed by the judge who tried the same."

In the case at bar, as will appear from pages 262 and 263 of the record, it appears that no amendments

were made by the learned counsel for plaintiff in this case, to the case made, notwithstanding the order previously made for the making of the case made contemplated that plaintiff might suggest amendments (page 261, Record). At the bottom of page 262 and top of page 263, appears a notice by defendants' attorneys on plaintiff's attorneys that on October 29, 1904, the case made would be presented to Judge Pancoast, the trial judge.

Now reference back to the above statute shows under those circumstances the case made when presented to the trial judge should *"be taken as true and as containing a full record of the case and certified accordingly."* Thus reads the Oklahoma statute.

When the case was presented to Judge Pancoast he "accordingly" made a certificate pursuant to the above statute in words and figures as follows (Record, 263):

"I, J. L. Pancoast, Judge of the District Court for the Sixth Judicial District, Territory of Oklahoma, of which district Woods county is a part, hereby certify that the above and foregoing case made was, by attorneys for defendant, presented to counsel for plaintiff within time; that all suggestions of amendments contained therein were duly made within time; *that the said case-made contains a full, complete, true and correct transcript of all the evidence offered on the trial of said cause,* together with all motions, objections, exceptions and rulings and other proceedings had therein; and I now sign and settle the same as a full, complete, true and correct case made in said above entitled cause, and order the same filed as a part of the records of this case.

Done at chambers, in Alva, this 29th day of Oct., A. D. 1904.

(SEAL) J. L. PANCOAST, Judge.

Attest: E. P. KELLY, Clerk.

Filed, Feb'y 24, 1905.

BENJ. F. HEGLER, Clerk Supreme Court."

In this connection it should be observed that this point was not made in the Supreme Court of Oklahoma, and the Supreme Court of Oklahoma, which we suppose is the proper tribunal to settle questions of this kind in cases which come to this court, treated the case made in this case thus certified as properly certified by the trial judge, and on that case made thus certified by the trial judge, as containing all of the evidence, the said Supreme Court considered the point as to whether the evidence was sufficient to support the verdict. In the case decided by the Supreme Court of Oklahoma, and cited by counsel at the top of page 31 of their brief, it appears that there was a certificate of counsel that the case made "contains all of the evidence." Also the certificate of the stenographer to the same effect, but there was not a certificate there as there is here by the trial judge himself that the foregoing case made contains all of the evidence, and the Oklahoma Supreme Court in that case held that the certificate of counsel and the certificate of the stenographer did not answer the purpose of the statute.

In the opinion in that case quoted in the brief of counsel there is the following language:

"The case itself must contain the positive averment by way of recital *or other equivalent,* showing that it does contain all of the evidence."

The certificate of the trial judge in which he positively certifies to the fact, is certain and a sufficient equivalent for a recital in the body of the case made. Besides, the above statute of Oklahoma clearly and distinctly contemplates that the judge shall certify that the case made is a full and complete copy of all the record and proceedings in the case. Therefore, his certificate in this case was in compliance with and in obedience to the statute.

V.

Believing that in the foregoing we have fully answered all of the new points and matters contained in the brief of the learned counsel of defendant in error, we submit the case to the court at this point.

Respectfully submitted.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
AND ODUS G. YOUNG,
Attorneys for Plaintiff in Error.

Supreme Court, U. S.
FILED.
JUL 22 1907
JAMES H. McKENNEY,
CLERK

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1907.

DRUMM-FLATO COMMISSION COMPANY, *Plaintiff in Error,*
vs.
R. C. EDMISSON, *Defendant in Error.*
No. 139.

In Error to the Supreme Court of the Territory of Oklahoma.

Statement, Specification of Errors, Brief and Argument of Plaintiff in Error.

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Statement, Specification of Errors, Brief and Argument of Plaintiff in Error.

STATEMENT.

This is an action at law and was tried by the court and a jury in the District Court of Woods County, Oklahoma Territory, where the suit was brought. The plaintiff in error, the Drumm-Flato Commission Company, was defendant, and the defendant in error, R. C. Edmisson, was plaintiff, in the trial court.

There was a verdict and judgment for Edmisson against the Commission Company, in the trial court,

and the case was taken from the trial court on a case made, under the code of Oklahoma, by the Commission Company, to the Supreme Court of Oklahoma. In the Supreme Court of Oklahoma the verdict and judgment of the trial court were affirmed. The opinion of that court may be found in the record at pages 265-271.

The case comes to this court by a writ of error and citation (pp. 3-4-1, Rec.) and by filing with the clerk of the Supreme Court of Oklahoma, with the writ of error and citation, an assignment of errors (p. 2, Rec.).

The Commission Company in suing out its writ of error to this court within due time gave a supersedeas bond which was approved by the Chief Justice of the Territorial Supreme Court, who allowed the writ of error and the citation (pp. 5-6, Rec.).

The amount of the verdict in the trial court against the Commission Company in favor of Edmisson was $7436.06 (p. 254, Rec.), and the trial court gave final judgment for that amount on that verdict (pp. 259-260, Rec.).

The action in form was a civil action under the Oklahoma code, but was in substance an action in trover and conversion for the alleged taking and conversion by the Commission Company of cattle belonging to Edmisson. The suit was brought April 7, 1900 (p. 14, Rec.). There was a trial of the case thereafter, at which trial the trial court sustained the demurrer of the Commission Company to plaintiff's evidence, and the case, at the instance of Edmisson was taken to the Supreme Court of Oklahoma, and that judgment was reversed and a new trial ordered.

Edmisson v. *Drumm-Flato Commission Company*, 13 Okla. Rep., 440.

After the case was thus remanded, there was a retrial in May, 1904 (p. 259, Rec.), and the verdict and

judgment against the Commission Company already referred to, were given. The proceedings upon this latter trial were embodied in a case made and the case taken by petition in error and case made by the Commission Company to the Supreme Court of Oklahoma (pp. 9 to 263, Rec.).

The case was docketed in the Oklahoma Supreme Court on February 24, 1905 (p. 263, Rec.), and the case submitted to the Oklahoma Supreme Court at the June term, 1905. (P. 264, Record.) The case was decided by the Oklahoma Supreme Court, September 5, 1906 (p. 265, Rec.), fifteen months after its submission.

In Edmisson's petition he claimed that the Commission Company had converted to its own use 410 head of cattle on which the Commission Company held certain mortgages given by Edmisson. (Pp. 14 to 16, Record.) The jury found that there was a conversion of 284 head of cattle, and the amount of its verdict was the value and interest thereon assessed by the jury on said 284 head of cattle. (Pp. 254 and 255, Record.)

The plaintiff in error was and is a commission company at Kansas City, Missouri, and Kansas City, Kansas, created a corporation under the laws of Missouri, and engaged during all the times mentioned in the record in this case as a live stock commission firm in buying and selling cattle and in making loans secured by chattel mortgages on cattle, with offices at said Kansas City.

Edmisson was the owner of a large range and ranch situated partly in said Woods County and partly in the adjoining county of Woodward, Oklahoma, the line between those counties running through his range and ranch, and he is a resident and citizen of Oklahoma. The Commission Company was practically the backer in a financial way of Edmisson in carrying on his ranch.

On December 19, 1898, Edmisson executed to said Commission Company as evidence of that amount of money borrowed by him from the Commission Company, notes aggregating the sum of $57,675.08. Those notes were made payable in May and June, 1899, and they were then renewed and the renewals fell due in October and November, 1899. The original notes aggregating said sum of $57,675.08 and the renewals, may be found from pages 230 to 236 of the Record. When the renewal notes were given in June, 1899, the original notes executed in December, 1898, were retained by the Commission Company and held as collateral security for the renewal notes.

At the time of the giving of the notes in December, 1898, Edmisson executed and delivered to the Commission Company two chattel mortgages covering all the cattle on his said ranch and range. Those chattel mortgages may be found in the record at pages 219-225. One mortgage secured $37,307.92 of said aggregate sum of $57,675.08, and the other mortgage (p. 225, Rec.) secured $20,367.16 of said aggregate sum. The first of said above mentioned mortgages conveyed as security 3,340 head of cattle on Edmisson's ranch and range (p. 220, Rec.), and the other mortgage conveyed 2,170 (p. 225, Rec.) of cattle on said ranch and range of Edmisson. The total number of cattle conveyed by the two mortgages were 5,510 head. The renewal notes secured by these mortgages matured, as already stated, in October and November, 1899.

A statement made by the Commission Company in its answer in this case, which statement may be found at page 19 of the Record, and which statement is taken from the books of the Commission Company, shows that in August, September, October and November, 1899, there was shipped out by Edmisson to the Commission

Company at Kansas City in all 1,180 head of cattle and calves covered by those mortgages, the last shipment being made November 21, 1900, and that the proceeds of those cattle sold by the Commission Company realized the sum of $22,366.98. This left due the Commission Company on November 21, 1899, after making the last shipment on that day, a balance at that time of $35,-308.10, with accrued interest added thereto, amounting in the neighborhood to $38,000. Deducting from the total number of mortgaged cattle, being, as we have seen, 5,510 head, the 1,180 head thus received on and prior to November 21, 1899, we have 4,330 head of cattle which Edmisson, if he had dealt honestly with the Commission Company, should have had left after making said shipments. However, it seems that prior to the last shipment made on November 21, 1899, the Commission Company had become in some way apprehensive about the condition of things on Edmisson's ranch, and sent its agent, J. F. Bryson, who was a witness in the case (pp. 138-143, Rec.), to the ranch. And Bryson, after rounding up all the cattle on Edmisson's ranch, found that there was, by actual count, 2,364 head of cattle in all on the range, when, as we have seen, there should have been 4,330 head (pp. 144-147, Rec.). It appears from said statement of the account (p. 19, Rec.) and from Bryson's testimony above referred to, that out of said 2,364 there were shipped over 700 head of cattle, leaving on the range after said shipment of November 21, 1899, less than 1,600 head of cattle. It seems that Edmisson accompanied this last shipment of between 700 and 800 head of cattle on November 21, 1899, to Kansas City, and on his arrival there the Commission Company was induced, by reason of the diminution of his cattle, to and did enter into a contract with Edmisson in words and figures as follows, to-wit:

"This agreement, made and entered into this 22nd day of November, 1899, by and between Drumm-Flato Commission Company, party of the first part, and R. C. Edmisson, party of the second part,

Witnesseth, That said R. C. Edmisson, the second party, hereby agrees to deliver to Drumm-Flato Commission Company nineteen hundred (1900) head of cattle as they run on the range (provided the same can be found to make this number of head) of various ages and on which said Drumm-Flato Commission Company hold a chattel mortgage.

The parties of the first part agree, in consideration of the delivery of the above mentioned number of cattle, to deliver to said second party, R. C. Edmisson, all of his notes, mortgages and other indebtedness due said Drumm-Flato Commission Company to this date.

It is further agreed by the parties mentioned that if Mr. Edmisson gathers as many as 200 head after the delivery to Drumm-Flato Commission Company of said nineteen hundred head of cattle, he is to turn over 100 head of the 200 gathered, or in case said Edmisson delivers to said Drumm-Flato Commission Company as many as two thousand head of cattle, any residue thereafter is to be retained by said Edmisson.

In witness whereof, we have hereunto set our hands the day and year above written.

R. C. EDMISSON,
DRUMM-FLATO COM. CO.
Per A. DRUMM, P't."

It will be observed that by this agreement Edmisson agreed, in full satisfaction of the entire balance of his indebtedness, to turn over 1900 head of cattle, and in the event that he gathered 2,100 head of cattle, then the Commission Company should have 2,000 head of cattle instead of 1,900, in satisfaction of its indebtedness. This agreement, as we have seen, was made upon the return of Bryson after rounding up the cattle on Edmisson's ranch, and after Bryson had found that,

after taking out the shipment of November 21st of between 700 and 800, ~~that~~ there was less than 1,600 cattle left on the ranch. As we have seen, there should have been on the ranch at that time 4,330 head of cattle instead of 1,600 head of cattle. What disposition Edmisson had made of his cattle during the year that elapsed between the giving of those mortgages in December, 1898, and November, 1899, is partially explained by the testimony of Mr. J. R. Gober (pp. 121-134, Rec.).

Mr. Gober was sent by the Commission Company in December, 1899, and January and February, 1900, after the trip of Bryson in December, 1899, to gather the remainder of the Edmisson cattle. As appears from the testimony of Mr. Bryson, 1,556 head of cattle were delivered by Edmisson through him (Bryson) after the above contract, in December, 1899, leaving a difference between said 1,556 head and 1,900 head undelivered in order to carry out said contract, of 344 head.

Mr. Gober states that in making search for the balance of Edmisson's cattle in order to satisfy said contract, he made search at different places, some of them quite remote from the ranch of Edmisson. He succeeded in finding 336 head of cattle altogether; some of them he found in Dewey County, Oklahoma, and his testimony at pages 122-123 shows that said number of 336 head were found in little bunches of from 15 to about 30 head, scattered at various points in Oklahoma Territory and more or less remote from Edmisson's ranch. In this way, as already stated, the discrepancy of 4,300 head of cattle in the number on Edmisson's range at the time of the warranty of this indebtedness, in November, 1899, is partially explained. Why some of those cattle were scattered at those remote points is not explained and is inexplicable except upon the hypothesis that Edmisson was concealing the whereabouts

of some of the cattle, making up the above discrepancy. The balance of the discrepancy after deducting said 336 thus found by Gober, has never been explained or accounted for.

Said contract, as we have seen, was executed on November 22, 1899, Edmisson being in Kansas City at the time of the making of that contract between him and the Commission Company. On November 24, 1899, after Edmisson returned from Kansas City when he signed the above contract, he sent the Commission Company a letter (p. 256, Rec.) of which the following is a copy:

"Driscol, Oklahoma, Nov. 24, 1899.

"Drumm-Flato Com. Co., Kansas City, Mo.

GENTS:—After leaving your city that night I looked at our contract and read carefully. *I found that one part of our contract was not put in, where you agreed that if I turned all the cattle that we could find on range and failed to find number of cattle mentioned in contract, that you would cancel all my notes and indebtedness and turn over to me.* Now I got home last night; Mr. Bryson will be here this morning; will go to work tomorrow to getting them together and will work as fast as possible to not jam or hurt cattle, and will ship to your advice. Please let me know at once if I am correct. We have had a great deal of rain here and weather still looks gloomy and probably will be bad to work, but I will work under Mr. Bryson's advice until we can gather all the cattle. Yours Resp'y,

R. C. EDMISSON."

The material part of that letter to which we call attention at this point, is that sentence in which Edmisson says, "I find that one part of our contract was not put in, where you agreed that if I turned all the cattle that we could find *on range* and failed to find number of cattle mentioned in contract, that you would cancel all my notes and indebtetdness and turn over to me."

The contract was not changed so as to conform to this suggestion. But there is nothing in the evidence to show that at that time the Commission Company knew of the concealment away from his ranch by Edmisson of his cattle as above explained. Those concealments by Edmisson of his cattle were not known until they were discovered by Gober in the following December, January and February, as above explained. Why Edmisson should desire to have the contract changed so as to apply only to his cattle found *on his range,* is not explained except upon the theory that he had in mind the distribution and concealment of his cattle in small bunches, as above explained. The only cattle received by the Commission Company after the making of said contract of November 22, 1899, were the cattle received by Bryson in December, 1899, and those received in 1900 by Gober. As already stated, the total number received by Bryson was 1,556 head. The total number afterward received by Gober was 326 head, amounting in the aggregate to 1,882 head, or 18 less than the 1,900 head which were due the Commission Company under the contract.

However, Edmisson, who became displeased because the Commission Company would not change his contract, as above mentioned, and who also became displeased because Gober was able to find out and after much industry and perseverance did gather the 326 head of cattle belonging to Edmisson that Edmisson had scattered away from his ranch, and concealed, as above described, brought this suit on April 7, 1900, by filing his petition herein, which may be found from pages 14 to 16 of the Record. In that petition Edmisson pleaded the mortgages and promissory notes which he had given the Commission Company, heretofore set out, and also pleaded said contract of November 22, 1899, and by his petition claimed

that the Commission Company had received 410 head of cattle over and above said 1,900. Of course it will be borne in mind all along that if the Commission Company received 410 head over and above 1,900 head, it was entitled to 2,000 head.

The answer of the defendant may be found from pages 17 to 22 of the Record, and the reply of Edmisson to that answer, at page 22 of the Record.

The issue made by the pleadings and which was the issue at the trial in the trial court, briefly stated, was whether the Commission Company, after said contract, had received more than the number of cattle it was entitled to receive under that contract. The special findings of the jury (p. 255, Rec.) were to the effect that the Commission Company had received in all 2,284 head of cattle, or 284 head in excess of 2,000, to which it was entitled. The verdict of the jury was for the conversion of said 284 head of cattle for the sum of $7,436.06, which sum was ascertained by assessing the value of the 284 head of cattle and computing interest thereon at seven per cent per annum as directed positively by the court. The motion for a new trial which was filed in the trial court after the verdict and which motion for a new trial was filed under the Oklahoma code of practice obtaining in the courts of that Territory, may be found at pages 260-261 of the Record. The specifications of error hereinafter set out are contained in said motion for a new trial. They are also contained in the assignment of errors filed with the writ of error and citation. (P. 2, Rec.) One of the specifications in the motion for a new trial is, that the said verdict of the jury is not sustained by sufficient evidence. In support of this point, plaintiff in error contends that there is not sufficient substantial evidence to show that the Commission Company received more than said 1,882 head of cattle

as above mentioned; that said 1,882 head of cattle were made up of the 1,556 head of cattle collected and received by Bryson in December, 1899, and the 326 head of cattle received and collected by Gober during the following year of 1900. The contention of Edmisson is that the number delivered through Bryson in December, 1899, was 1,710 head instead of said number of 1,556 head. The further contention of Edmisson is that the number collected and received by Gober was 575 head, making in all 2,285 head, one more than the number found by the jury.

The Commission Company claims that the evidence does not sustain the contention that there were more than the 1,882 head received as claimed by the Commission Company, and that therefore the verdict of the jury and judgment thereon, not being sustained by the evidence, is erroneous and should be set aside and reversed for that reason.

The discrepancy between Edmisson's claim and the testimony that Bryson only received 1,556 head in December, is explained thus: After the return of Bryson to Edmisson's ranch following the making of the contract of November 22, 1899, Edmisson and Bryson cooperated in gathering together on Edmisson's ranch the cattle which were at that time shipped.

According to the testimony of Edmisson (p. 54, Rec.) and of one Black (p. 95, Rec.), the cattle that were being rounded up were driven through a gate late in the day, and according to the count made by Edmisson and Black, the number driven through the gate was 1,710 head. The cattle that were driven through that gate were driven thence into the adjacent pastures of Harrington and Roberts.

At this point it should be observed that the range of Edmisson was an open one, and that other cattle of

neighboring ranches had gotten mixed up with his cattle and all including said other cattle were driven through his gate, there being 1,710 head of all kinds. The next day after they were driven through that gate they were before shipment rounded up in the pastures of Harrington and Roberts and quite a number of steers belonging to other ranchers were cut out. Thus, at page 66 Edmisson testifies as follows:

"Q. Were these cattle rounded up the next day and worked again? A. Yes, sir.

"Q. How many strays were cut out at that time, if you know? A. I could not tell you how many; not very many.

"Q. Were you at that round-up? A. Yes, sir.

"Q. Whose cattle were cut out that day? A. There was different cattle; there was some that belonged to the Headquarters ranch, they called it Smith, Maxwell & Morris, and some belonged to Mr. Roberts, and probably others, I couldn't say."

After the cattle had thus been rounded up and a number of them taken out, they were driven to Curtis, which is distant a few miles from Edmisson's ranch, and which is a station on the railroad where the cattle were shipped to the Commission Company at Kansas City. The undisputed testimony is that the cattle that were collected on the ranch were driven to Curtis and from there shipped to Kansas City, and that the number shipped and received at Kansas City was 1,556 head altogether. The testimony of Edmisson and Bryson shows that said shipment was made in two train loads. Bryson accompanied one train load and Edmisson the other train load. In these two train loads there were (p. 19) 1,246 cattle and 243 calves. Two cars out of one of the train loads in addition to those and containing 67 head of cattle, were detained on the way by a sheriff on account of Edmisson's taxes due on

the cattle. But said 67 head were afterwards released by the sheriff on the payment by the Commission Company of the taxes, and were forwarded with the rest. The two train loads, less said 67 head of cattle, were received at Kansas City on December 7, 1899, and said 67 head were forwarded and received at Kansas City on December 11, 1899. The total of 1,556 head of cattle so received appears from the statement of the Commission Company in its answer at page 19 of the Record as follows:

Dec. 7, 1899	1246 cattle.
	243 calves.
Dec. 11, 1899	67 head.

That statement of account accords with the copy of the sales book of the Commission Company which sold the cattle on their arrival, which may be found in the Record at pages 204-205 thereof.

There is no claim and never has been any claim in the case, either by Edmisson or his counsel, that the number of cattle shipped by Bryson and Edmisson from Curtis, Oklahoma, and consigned to the Commission Company and received and sold by the Commission Company at Kansas City, were either more or less in number than the number of cattle which belonged to Edmisson that were driven through said gate and from his ranch to Curtis. In other words, there is no pretense that the number of cattle belonging to Edmisson which he rounded up on his own ranch and drove through the gate, was any greater or less than the number of cattle shipped by Edmisson and Bryson from Curtis to and received and sold by the Commission Company at Kansas City. Undoubtedly there were more cattle driven through the gate, as testified to by Edmisson and Black than were driven from the Harrington and Roberts pasture to Curtis, for the reason already explained, that the next

day after the cattle were driven through said gate they were rounded up in the said pastures of Harrington and Roberts, and quite a number of cattle belonging to other ranchers were cut out from the bunch before they were driven to Curtis.

The witness, Black (p. 99, Rec.), who testified for Edmisson and who was present at the time the cattle were driven through the gate and into the Harrington pastures, testified as follows:

"Q. What was done with these cattle after they were counted into the Harrington pasture? A. When they were watered they were turned loose until next morning.

"Q. What was done with them then? A. We rounded them up and started to Curtis with them.

"Q. Were there any other cattle in the Harrington pasture? A. There might have been a few strays.

"Q. Was—what was done with these strays? A. Taken to Curtis.

"Q. What was done with them when you got to Curtis? A. We cut them out then.

"Q. What was done with these cattle after the strays were cut out? A. They were put into the shipping pens and shipped to Kansas City.

"Q. State to whom they were shipped, if you know? A. The Drumm-Flato Commission Company.

"Q. Who shipped them? A. Jim Bryson shipped them."

This testimony shows that the number of cattle driven through the gate and which Bryson and Edmisson say numbered 1,710 was afterwards diminished by the cutting out of some strays. According to the testimony of Mr. Black there were strays cut out after the arrival of the cattle at Curtis.

Another witness for Edmisson was W. M. Holman (p. 109, Rec.). Mr. Holman was also present when the cattle were driven through said gate, and he says that

there were 1,710 head at that time. But he also explains (pp. 110-111, Rec.) that the next day after the cattle were driven through the gate and turned into the Roberts pasture they were rounded up again and quite a number of cattle were taken out. His testimony on this point is as follows:

"Q. What became of these cattle after they carried them through the gate? A. We rounded them up in Roberts' pasture.

"Q. Under whose direction did you round them up? A. Mr. Bryson's.

"Q. What was the purpose in rounding them up, if you know? A. To hold them over night.

"Q. When was this? A. About dark in the month of December.

"Q. State whether or not the cattle were held over night in the Roberts pasture? A. Part of the night.

"Q. What did you then do with them? A. Turned them loose.

"Q. How long did they remain loose in that pasture? A. Till the next morning.

"Q. What did you then do with them? A. Rounded them up again.

"Q. Then what did you do with them? A. They began to cut out some cattle and I left.

"Q. Under whose directions were those cattle cut out? A. Mr. Bryson, I suppose; I could not say for sure.

"Q. Did you aid in cutting them out? A. No.

"Q. State whether or not you know how many were cut out? A. I do not.

"Q. Do you know what became of them, of these cattle after they began to cut cattle out of the herd? A. No.

"Q. After you counted the cattle at the gate and till they began to cut the cattle out, at which time you left, for whom were you working during that time? A. Mr. Bryson.

"Q. State, if you know, who were giving orders and directions as to the management of the herd of cattle during that time? A. Mr. Bryson.

"Q. State whether or not you had anything more to do with this herd of cattle after you quit? A. Yes.

"Q. When? A. Next night.

"Q. State whether or not these cattle that you counted at the gate were ever removed from the Roberts pasture? A. Yes.

"Q. State, if you know, who had them removed from that pasture? A. Mr. Bryson.

"Q. State whether or not you assisted Mr. Bryson in removing the cattle from that pasturre? A. Yes.

"Q. Where did you take them to? A. Started to Curtis with them.

"Q. Did you take them to Curtis? A. Yes. We got to Curtis about sundown, the same day, then turned them loose in a small pasture near Curtis.

"Q. What time of day was it when you turned them loose? A. Between sundown and dark.

"Q. State, if you know, how many cattle were driven by Mr. Bryson, from Roberts' pasture to Curtis? A. I do not know.

"Q. State, if you know, how many cattle were cut out of this herd in Roberts' pasture? A. I don't know.

"Q. Do you know what brand was cut out in Roberts' pasture? A. No.

"Q. State, if you know, how many cattle were placed in the small pasture by Bryson at Curtis? A. I do not know.

"Q. State, if you know, what became of those cattle after they were placed in the small pasture at Curtis? A. We rounded them up the next morning after we turned them loose the night before.

"Q. State what became of them then? A. We cut out about ten or fifteen head that got in that night, then grazed them until about three o'clock in the evening.

"Q. State what was then done with them? A. I could not say. I quit there.

"Q. State whether or not Mr. Edmisson assisted any in rounding up and handling these cattle as you have before stated? A. Yes."

This testimony of Mr. Holman shows that quite a number of cattle must have been cut out of the bunch while they were in the Roberts' pasture, and that there were also some cut out of the bunch after their arrival at Curtis. Mr. Holman also explains that the counting the evening before when they were driven into the Roberts pasture when they went through the gate, was for mere curiosity (p. 113, Rec.). At page 115 Mr. Holman said that Edmisson was present when the cattle were rounded up in the Roberts pasture and when the strays were cut out of the bunch.

Mr. Bryson testified that it was about four days after the making of the contract on November 22, 1899, when he returned to Edmisson's ranch (p. 150, Rec.). The cattle which had been rounded up on the occasion when Bryson was at the Edmisson ranch, prior to that contract, had become scattered and the cattle were again rounded. Bryson says that they were counted in the stock yards at Curtis, and that no other count was made of the cattle, and he says that the number of cattle, cows and calves, that were shipped out and which were counted when Edmisson and he were both present, at Curtis, was 1,556 head. This was the number by actual count at Curtis, made of the cattle when both Edmisson and Bryson were present, at the time of the making up of the two train loads which Bryson and Edmisson accompanied to Kansas City. And in this connection it will be observed that the count of 1,556 head was made after the strays were taken out that were cut out of the bunch in the Roberts pasture and after the strays that were in the bunch on the way to Curtis were also taken out. The testimony of Mr. Bryson on this point is as follows (p. 150, Rec.):

"Q. There has been something said here about these cattle being counted through a gate that goes from Mr. Edmisson's pasture into Mr. Harrington's pasture. Do you know anything about any such count being made? A. Never was any count made there. The cattle were put through that gate, but they were never counted.

"Q. Then the cattle were first counted at where, you say? A. They were counted at Curtis at the stock yards.

"Q. How many head were counted? A. Fifteen hundred and fifty-six cows and calves.

"Q. Was Mr. Edmisson there when they were counted? A. Yes, sir."

As to the number of cattle which were cut out of the bunch after they were driven through the first gate referred to and while they were in the Harrington and Roberts pasture, Mr. Bryson says that there were from 150 to 200 cut out. Bryson's testimony on this point is as follows (p. 153, Rec.):

"A. Why, they were under round up, that is, they were working them, they worked them all day until four o'clock in the afternoon, four or five o'clock in the afternoon, and I asked these men that were working there to suspend work and allow me to move the cattle down on the water and water them and graze them a little. I had to hold them that night. I says, after tomorrow morning I am going to put them in this pasture over here and tomorrow morning you can round them up, to defer working them. I suggested the idea to them it would be necessary for me to water them. There was fifteen or twenty men working at them all day long, and I moved them down on this little canyon or draw that there is there, small place for water, and held them there and watered them the best I could that evening before I put them into this Harrington pasture. I didn't get the rear of the cattle off that creek, I guess it was half or three-quarters of a mile up to the gate, and I didn't get the rear of the cattle watered over there until near dark. I was left behind on that little creek with those rear cattle, until I could get them up to the gate.

"Q. Did you notice anybody at them when you got there? A. Well, when I got there with the rear cattle, there was five or six men there; Mr. Edmisson, I think, was there, and these three men I had employed, and maybe one of his men.

"Q. Did you round up the next morning? A. Yes, sir, I rounded up the next morning.

"Q. Well, was there any of these fellows there— A. Mr. Maxwell's man, Maxwell & Morris', worked until about eleven o'clock, and I rounded up the cattle in the three different pastures. Worked as rapidly as we could.

"Q. Did they take any cattle out? A. Yes, sir.

"Q. About how many? A. *Two hundred head, I should judge; maybe a hundred and fifty; I couldn't say exactly what number.*

"Q. Now this was done after they went through the gate? A. Yes, sir.

"Q. Did you clean the herd up entirely clean there before you started to Curtis? A. *That was the final work on them. I requested these men to get all their cattle out, I didn't want to ship any except what belonged to Mr. Edmisson. That is what I requested them to get, their cattle out of there.*

"Q. You drove these cattle to Curtis? A. Not that night. I remained in that same pasture that night.

"Q. When was it you got to Curtis? A. Well, I got to Curtis the next day. I got to the little school section or pasture about half a mile south of Curtis, or east, I believe it is, along in the afternoon, late in the afternoon, put them in there and *then we worked the strays out again, handled them to see if we could find any*, and penned them at the stock yards just before we were going to ship them.

"Q. What time did you go to ship them? A. One train along in the afternoon, and the other one didn't get out until after midnight; well, it was after daylight when I passed here; along eight or nine o'clock; eight or nine o'clock, I can't recollect just exactly what time it was we did get them loaded there at Curtis, but I know it was along towards daylight.

"Q. You never, then, had anything more to do with the matter, did you? A. No, sir."

This testimony shows explicitly and circumstantially about the number of cattle that must have been taken out of the bunch in the Harrington and Roberts pasture. There is no contradiction among the witnesses that the number driven through the gate as testified to by Edmisson and Bryson was 1,710 head. If we deduct from that 1,710 head the 150 head, which is the minimum number given by Mr. Bryson that was cut out in the Harrington and Roberts pasture, and of which there is no contradictory evidence, we have the remainder of 1,560 head. Mr. Bryson says that the number of cattle, according to the actual count at Curtis, when both Edmisson and Bryson were present, was 1,556 head, and there were more than four head taken out, as we have seen, between the Harrington and Roberts pasture and Curtis.

The evidence of Mr. Bryson and the other witnesses to which we have referred, as showing that the number of cattle received by the Commission Company from Edmisson through Bryson, was 1,556 head, is also supported by the testimony of John L. Rune, who was the yard man of the Commission Company in the Kansas City stock yards at the time of the receipt of those cattle. It was the duty of Mr. Rune as such yard man of the Commission Company, to count the cattle as they were turned over by the Kansas City Stock Yards Company to the Commission Company. Mr. Rune's testimony may be found from page 189 to page 203 of the Record. At the bottom of page 189 and the top of page 190, Mr. Rune shows that it was his duty in the course of business in the yards to count the cattle and to make out a separate tab for the salesman of the Commission Company whose business it was to sell the cattle, of how

many cattle there were in each pen and the kind of cattle they were, and also to make a report of his tally and count to the bookkeeper of the Commission Company. Mr. Rune testifies from his recollection about the count of the Edmisson cattle received through Bryson, and his testimony is as follows (pp. 190-193, Rec.):

"Q. Who takes charge of these cattle when they are unloaded off of the cars? A. The yards company.

"Q. Then the yards company turns them over to you? A. Yes, sir.

"Q. Does the yard company count these cattle when they are received from the railroad? A. They count them out of the chutes.

"Q. Out of the chutes? A. Yes, sir.

"Q. Then where do you usually count them; where are the cattle? A. We count them at the pens; take them to the pens and count them there with the yard company's division men.

"Q. Then you, in connection with the yard company's division man, count them over again at the pens? A. Yes, sir.

"Q. Well, if there is a discrepancy in the number there and those they have tallied out of the chute, what then is done? A. I then report it to the claim agent and he comes down, and if there is a miscount, we count all these cattle over again, I and the claim agent and also the division man.

"Q. Is there any record made of these cattle by the yard company? A. Yes, sir.

"Q. Do you know R. C. Edmisson of Woods County, Oklahoma? A. Yes, sir.

"Q. How long have you known him, Mr. Rune? A. I have just known him since he had these cattle in down there.

"Q. Were you acquaintetd with the R. C. Edmisson cattle? A. Yes, sir.

"Q. Do you remember what the brands of his cattle were? A. Yes, sir.

"Q. Please state what the brands of his cattle were that he shipped in? A. They were 55 bars, 55's, J. W.'s and X 2 bars.

"Q. Had he been doing business with the Drumm-Flato Commission Company for some time? A. Yes, sir.

"Q. Do you remember of any of the cattle of the above brands being in the yards consigned to the Drumm-Flato Commission Company during the month of December, say, from the 5th to the 15th? A. Yes, sir; I don't know the exact date, but along in between there from the 1st to the 15th, along there.

"Q. Do you know about how many cattle there were in the above brands at that time?"

By Mr. Swindell: Objected to as incompetent, irrelevant and immaterial.

By Mr. Snoddy: This is not a count that was taken from the cars there. It is incompetent, irrelevant and immaterial.

By the Court: That may all be, only if he knows what were there, why would it not be competent to let him state, for what it is worth? The thought has been running in the mind of the court whether he knows that testimony of his knowledge.

By the Court: He discloses from his testimony that he has some duty to perform in separating the cattle, getting them into the pens, receiving them second-hand from other parties.

By Mr. Snoddy: He don't receive them from the railroad company.

By the Court: No, certainly not, but if he knows how many there is there, it may be competent for whatever it is worth.

By Mr. Snoddy: At the same time the evidence is undisputed in this case if it is told at all, the count, it must have been made at the other place.

By the Court: Whatever bearing this may have upon what cattle were delivered, it may go in; the weight of the testimony, however, is for the jury.

By Mr. Snoddy: The delivery, as I understand, is made to the yard man and by the yard man to the Commission Company, and this is testimony of an employee of the Commission Company as to what he got there.

By the Court: Yes, that only serves to weaken the testimony and does not go to its competency.

Here the stenographer reads as follows:

"Q. Do you know how many cattle there were in the above brands at that time?

By the Court: He may answer the question.

By Mr. Snoddy: He don't state where.

By Mr. Swindell: Exception.

By the Court: I don't care where.

A. Oh, all the brands together?

Q. Yes, sir, the 55's, 55 bar, J. W.'s and X2 bars? A. Yes, sir.

Q. How many? A. 1,250 cattle and 243 calves.

Q. Were all of these 1,250 in the brands above? A. How is that?

Q. Were all of these 1,250 head that you just mentioned in the brands above? A. Yes, sir; that is, counting calves; 1,250 cattle and 243 calves.

Q. Were these 1,250 cattle, were they all in those brands, or were some of them cut out? A. Why, there was three, I think, cut out, claimed by the inspector.

Q. The rest of the cattle, then, were in the brands that you have above mentioned? A. Yes, sir.

Q. What did you do with these cattle, Mr. Rune? A. After I sorted them?

Q. Yes; what makes you remember distinctly about this bunch of cattle coming in at this particular time? A. Because I think it is the hardest job I ever put in on a bunch of cattle, in sorting them, so many of them and all mixed up, and I had instructions from Lampe to class each brand separate, and did class them after I had the brands sorted.

Q. Do you remember whether Mr. Edmisson was present that day? A. Mr. Edmisson was there when I was sorting some of them; he was on the fence with me.

Q. Do you know who consigned the cattle at that time?

By Mr. Snoddy: Objected to as incompetent, irrelevant and immaterial.

By the Court: Oh, if he knows he may answer. I don't know how he knows. I do not suppose that is a very material proposition one way or the other. He may answer.

A. Yes, sir; J. F. Bryson, I think, is the way they were consigned at that time.

Q. Curtis, Oklahoma? A. Yes, sir.

Q. Was Mr. Bryson in with the cattle, too, at that time? A. He was there; yes, sir.

Q. Were there any cattle following this bunch in the same brand, shortly after that time? If so, how many, about? A. Why, there were two loads, I think, after that; about 64 cattle. I think there was some came in two or three days afterwards, perhaps four or five days afterwards."

It seems to us that this testimony, in connection with that of Bryson and the other testimony to which we have called attention, makes it conclusive that the number of cattle received by the Commission Company from Edmisson, through Bryson, was the number given by Bryson and Rune.

It thus appears on the uncontradicted evidence that the number of cattle received by Bryson in December, 1899, from the Edmisson ranch, was 1,556 head, and not 1,710 head, as claimed at the trial by Edmisson. The jury in is special findings, found that the number received by Bryson was 1,710 head (p. 255, Rec.). The evidence is conclusive that the number received through Bryson was 1,556 head.

We do not ask the court to re-try this case upon the questions of fact. We ask the court to say as a matter of law that on the evidence the number of Edmisson cattle received through Bryson was 1,556 head. Edmisson does not say that the number of cattle, after the cutting out at the Harrington and Roberts pasture, was not 1,556 head when the count was made at Curtis. Nor does he claim, nor can he claim, that there was any different number of head shipped from Curtis, belonging to him (Edmisson), than the number belonging to him that went through the gate and that belonged to

him and were in the Harrington and Roberts pasture. The same error was committed by the jury in its finding as to the cattle received by Gober after January 1, 1900. In the finding of the jury (p. 255, Rec.) it is stated that the number of cattle gathered by Gober was 574 head. We submit that the evidence shows only 326 head. Gober's testimony may be found at pages 122-123 of the Record, and is explicit on this point. The testimony of Gober is supported by that of J. M. Barclay (p. 134, Rec.). Barclay accompanied Gober in the latter's search for Edmisson's cattle at the different points where they were scattered, and the testimony of Gober and of Barclay prove that the total number of cattle of Edmisson gathered by Gober was 326 head, and not the number of 574 head found by the jury. It is proper, however, in this connection that we should show how the jury came to the conclusion that there were 574 head of cattle gathered by Gober, instead of 376 head, as shown by his testimony.

A witness on this point for Edmisson was one John F. McFadden (p. 80, Rec.). It seems that Mr. Gober had a ranch on which he had quite a number of cattle, including the Edmisson cattle that he had gathered. Mr. McFadden swears that he was in Gober's pasture in May, 1900. Mr. McFadden says that he is familiar with the Edmisson brands of cattle, and that his estimate of the number of the Edmisson cattle that he saw in Gorber's pasture in May, 1900, was about 575. Mr. McFadden's testimony is as follows:

"A. My estimate would be about 575.

Q. State how you came to be looking at this brand and mark on these cattle at this time? A. I was looking for some grass and drifting through that part of the country, I run on to this bunch of cattle directly after they come off from feed. The X-2-Bar cattle were branded in my earmark which directed my attention to

them particularly. They were bunched, just had been turned loose. I rode through them and examined them, looking for my interests."

Mr. McFadden said that he was through the Gober pasture again in July, 1900, and that the cattle looked to be about the same bunch of cattle that he saw before, and he again estimated them, he said, at the same number, 575 head. He did not pretend to have counted the cattle, only made a sort of a guess or an estimate, as he testifies.

In another point of Mr. McFadden's testimony (p. 85, Rec.) he more definitely described how he came to fix his estimate of the cattle at 575, as follows:

"Q. Well, why did you put this number at exactly 575? A. I met a party, a rider, possibly a mile from this bunch of cattle, and we were talking about the range and grass, and I told him my business, stranger to me, and I was a stranger to him, and I asked him if he could tell me where a nook was down there—supposed to be a section of country enclosed, with one end wasn't closed, or a neck, I think he called it, and he said he guessed I was in it. He stated there was a bunch of cattle throwed in there that day of that number.

Q. Of what number? A. Of that number.

Q. So that is the way you arrived at the number of cattle there was in that bunch? A. No, sir, not particularly. I went right straight to the cattle, because he told me where they were, and I looked at the cattle and my estimation of them was he was correct, there was that many cattle there.

Q. But that to you was—what makes you think there was 575 head was that this fellow told you? A. No, sir; I expected to see a prety good sized bunch of cattle, and I found them."

Another method of proving on the part of Edmisson that the number of Edmisson's cattle in Gober's pasture which he had gathered for the Commission Com-

pany was 574, was by asking Gober when on the witness stand, on cross-examination (p. 125, Rec.) whether he had not stated to John J. Gerlach at Woodward, Oklahoma, about the time of his employment by the Commission Company, that he was to get $3 per head for gathering the Edmisson cattle for the Commission Company, and that he expected to make from a thousand to fifteen hundred dollars from such gathering. And Mr. Gerlach (p. 240, Rec.) was permitted by the trial court to testify against defendants' objection that Mr. Gober did say to him that he was to get $3 per head for gathering these cattle and that he would make from one thousand to fifteen hundred dollars. It is not seen how this testimony has any tendency to prove the number of cattle which Gober afterwards actually collected. If he afterwards made one thousand dollars, which Gober claimed he might make, and afterwards received $3 per head, that would mean that he afterwards gathered 333 head. But the statement was merely a speculative one on the part of Mr. Gober in advance, that he was of opinion that as he was to get $3 per head he would make from one thousand to fifteen hundred dollars. It is not seen, therefore, that either the testimony of Mr. Gerlach or Mr. McFadden has any tendency whatever to prove that the number of cattle gathered by Mr. Gober was otherwise than the number testified to by him, Mr. Gober, as 326 head. Adding together the number of head received by Mr. Bryson as 1,556 head and the number of 326 received by Gober, we have a total, as already stated, of 1,882 head, or 18 less than the 1,900 head to which the Commission Company was entitled. And thus we see that the verdict is without any support whatever in the evidence.

The point that the verdict is not sustained by the

evidence is set forth in the fifth point of the motion for a new trial, in the following words: "Fifth: Because the verdict in the said action is not sustained by sufficient evidence." (P. 260, Rec.)

The overruling of that motion for a new trial was excepted to in the trial court (p. 261, Rec.). And the point of the insufficiency of the evidence is assigned in the assignment of errors on this writ of error (p. 2, Rec.) that the Supreme Court erred in affirming the judgment of the District Court of Woods County, in this case. It is also set forth in the third assignment of the assignment of errors in this case (p. 2, Rec.) that the Supreme Court of Oklahoma in this cause erred in overruling the assignment and contention of plaintiff in error that there is not sufficient evidence in the record to support the verdict of the jury against the plaintiff in error.

Another point arising in this case on this writ of error is, that the trial court erred in rejecting the books of account kept by the Commission Company and showing the number of Edmisson cattle received through Bryson and sold in December, 1899. This point arises in connection with the testimony of John L. Rune (p. 189, Rec.) and the testimony of John L. Burnett (p. 180, Rec.). As we have seen, Mr. Rune was the yardman of the Commission Company who received and counted these Edmisson cattle shipped through Bryson after the receipt of those cattle by the Commission Company in the stock yards at Kansas City. Mr. John L. Burnett was the bookkeeper of the Commission Company. The testimony of Mr. Rune, as we have seen, was that he counted the cattle and he gave therein the number of the cattle in his statement, and his testimony shows that one of his duties in connection with the counting of the cattle was to turn over a statement of ac-

count to the salesman who was to sell the cattle, and that he turned over a statement and the scale tickets to the bookkeeper, Mr. Burnett, to make the entries of the cattle in the sales book. The evidence shows that these cattle were sold by the Commission Company immediately upon their receipt in the stock yards. Mr. Burnett's testimony, with that of Mr. Rune, were taken in a deposition at Kansas City. The sales book of the Commission Company for December, 1899, was produced in connection with Mr. Burnett in the giving of his deposition. That sales-book of the Commission Company showed that on December 7 and December 11, 1899, the 1556 head of cattle shipped out by Bryson from Curtis and belonging to Edmisson, were received and sold by the Commission Company. Copies of the account of sales of those cattle, market Exhibits "A" and "B" were appended to the deposition of said John L. Burnett, and said copies of the said account of sales of the said 1,556 head of cattle may be found at pp. 204-205 of the Record. Respecting the entries thus copied in the account of sales of those cattle, Mr. Burnett testified as follows:

"Q. About what time did you begin working for them in 1899? A. January first.

Q. Were you acting in the capacity of bookkeeper for them at that time? A. Yes, sir.

Q. I will ask you, Mr. Burnett, what book this is I now hand you? A. Sales book.

Q. The sales book for whom? A. Drumm-Flato Commission Company.

Q. What do you mean by sales book? A. The sales book is the record of all the sales made in the yards here by the Drumm-Flato Commission Company.

Q. Did you keep that book for them at the time you were in their employ? A. Yes, sir.

Q. In whose handwriting are the entries in that book on page 415? A. Well, some of them are in mine

and some of them are not. All of the entries on that page are in my handwriting, except a few postings to the ledger, which have nothing to do with the entry of the sales proper.

Q. Now, where did you get your information from which you made these entries on this sales book? A. From the stock yards company's scale tickets.

Q. Stock Yards Company's scale tickets? A. Yes, sir.

Q. And were those scale tickets in your possession or are they in the possession of the Drumm-Flato Commission Company? A. No, sir; they are in the possession, or should be, of the buyers of the cattle or stock.

Q. Then how is it that you got these tickets from which to make the entries in this original book of entries? A. When the Drumm-Flato salesman made the sales, the cattle were weighed by the Stockyards Company and tickets delivered by the Stockyards Company's employes to the employes of the Drumm-Flato Commission Company, from whom I got them.

Q. Then what did you do with the tickets after you got them? A. I figured the tickets, made the extensions and then made my entries on the sales book.

Q. Then what becomes of them? A. Then I render invoices covering the tickets and attach the tickets to them and send them to the buyers.

Q. Send them to the buyers of the cattle? A. Yes, sir.

Q. You then have no further possession of the tickets than simply to make the entries in this original sales book? A. That is all. After the entries are made the tickets leave our possession. By the way, that applied then, don't apply now. We have a new system.

Q. I don't care about what you have now. Did you make these entries in this book at the time of the transactions therein? A. Yes, sir.

Q. All of them? A. All of them.

Q. Did you make this record of the transactions the day they occurred? A. Yes, sir.

Q. I will ask you to turn to the date of December

11, 1899, on what page do you find that date? A. Page 418.

Q. Of what book? A. Sales book.

Q. Are those entries in your handwriting? A. Yes, sir."

This evidence of the account of sales thus produced from the books of the Commission Company and kept by the witness, Burnett, and offered in connection with his evidence, were excluded by the trial court as not competent evidence, and the defendant Commission Company excepted. (p. 182, Rec.)

This ruling was also assigned as error in the motion for a new trial and in the seventh subdivision thereof, as follows:

"Because of errors of law occurring at the trial and duly at the time excepted to by said defendant and to which errors the said defendant still excepts." (pp. 260-261, Rec.) This ruling is also assigned as error in the fourth subdivision of the assignment of errors on the writ of error in this court as follows, viz: Said Supreme Court of Oklahoma erred in holding that the books of account of the plaintiff in error were not admissible for the purpose of proving how many cattle plaintiff in error received from defendant in error after the making of the contract dated November 22, 1899. (p. 2, Rec.)

Another point arising on this writ of error is that the trial court erred in giving instruction No. 7 of the jury. (pp. 247-248, Rec.) That instruction is as follows:

"Now, I stated that this is an action which would be denominated at common law as trover, that is, the wrongful conversion of personal property.

Conversion of personal property is an unauthorized act which deprives a man of his property permanently.

In such a case, no demand for the return of the property is necessary. Under our statute and laws, the detriment caused by the wrongful conversion of the property of another, as applicable to this case, if you find there was a conversion is the value of the property at the time it was taken, *with seven per cent. interest thereon from that date until the present time.* In other words, gentlemen of the jury, if you find that the defendant did take the cattle of the plaintiff in a number in excess of the amount mentioned in the contract, then the plaintiff is entitled to recover in a sum which is the value of the excess so taken, *and interest thereon from the time taken until the present time.*"

The contention of plaintiff in error in regard to this instruction is, that the court should have left to be determined by the jury at its discretion, whether interest should be added to the value of the cattle or not, and that the court should not have directed the jury peremptorily to compute interest. And in that connection, the court, in its eighth instruction (p. 248, Rec.) told the jury to add interest at the rate of seven per cent.

The Commission Company saved exceptions to the giving of these instructions (p. 251, Rec.), after the giving of the instructions and before the arguments to the jury.

The giving of these instructions is assigned as error in the ninth subdivision of the motion for new trial, the overruling of which was excepted to by the Commission Company (p. 261, Rec.) And the action of the Supreme Court in approving those instructions is recited as error in the fifth subdivision of the assignment of errors on this writ of error. (p. 2, Rec.)

Another point arising on this writ of error is that the trial court erred in not insisting to the jury that they answer the fifth special interrogatory as follows: "How many cattle did J. F. Bryson ship from Curtis to Kan-

sas City?" Under the provisions of the Oklahoma Code, which are to be found also in the codes of some of the other code states, the jury in the trial of a civil action is required to answer special interrogatories.

In the trial of this case the Commission Company submitted for answers by the jury, the interrogatories to be found at p. 255, Record. The trial court disallowed some of those interrogatories, but allowed other interrogatories, and instructed the jury to answer those interrogatories, and among the interrogatories which the trial court instructed the jury to answer was said interrogatory number 5, by which the jury was required to answer "How many Edmisson cattle did J. F. Bryson ship from Curtis to Kansas City?" The jury only answered some of the interrogatories, but answered said interrogatory number 5 as follows: "Not sufficient evidence to determine."

When the jury reported its verdict and its answers to said interrogatories, with the above answer to said interrogatory number 5, the counsel of the Commission Company moved the court to re-submit said interrogatory number 5 to the jury and require the jury to answer the same. The court declined to re-submit said special interrogatory to the jury; to which ruling of the court the Commission Company at the time excepted. (p. 254, Rec.)

The refusal of the jury to answer and the refusal of the court to require the jury to answer said interrogatory number 5 is assigned as error in the motion for a new trial, in the first and second subdivisions thereof. (pp. 260-261, Rec.) This ruling is involved in the first assignment of the assignment of errors on the writ of error herein (p. 2, Rec.) that the Supreme Court of Oklahoma erred in affirming the judgment of the District Court.

Another point arising for determination on this writ of error is, that the Commission Company did not have a fair trial in the trial court. This assignment of error is based on the claim by the Commission Company that certain remarks were made during the trial, at different times, in the presence of the jury, by the trial judge, that were prejudicial to the rights of the Commission Company, and that as a result of those remarks the Commission Company did not have a fair trial. Those remarks of the trial judge will fully appear in point 5 of the brief and argument hereinafter set out. That point is contained in the sixth subdivision of the assignment of errors herein, to the effect that the Supreme Court of Oklahoma erred in holding that the plaintiff in error had a fair trial in said District Court.

SPECIFICATION OF ERRORS.

Plaintiff in error says that the Supreme Court of Oklahoma and the District Court of Woods County, Oklahoma, in the trial of this cause, committed the following errors:

1. There is not sufficient evidence in this record to sustain the verdict of the jury or the judgment of the court.

2. The court erred in rejecting the books of account kept by the defendant Commission Company and showing the number of Edmisson cattle received and sold by the Commission Company in December, 1899.

3. The court erred in giving said instructions numbered 7 and 8, peremptorily telling the jury in this action of trover to award Edmisson seven per cent interest on the amount of value found by the jury, of the cattle taken.

4. The court erred in not requiring the jury to answer said interrogatory number 5 as to the number of Edmisson cattle Bryson shipped from Curtis to Kansas City.

5. By reason of the remarks of the trial judge during the trial, in the presence of the jury, the Commission Company did not have a fair trial.

BRIEF AND ARGUMENT

I.

We submit that there is no substantial evidence in this case supporting the verdict. We submit that there is no substantial evidence in this case that defendant ever received after the date of said November 22, 1899, in excess of 2,000 head of cattle. The uncontradicted evidence in the case shows that whatever cattle were delivered by Edmisson to defendant after the date of said contract or received by defendant on its own collection were through two agents of the defendant, one J. F. Bryson and the other J. R. Gober. The cattle which came to the defendant through Bryson were delivered and received in December, 1899, and the cattle which came to the defendant through Gober were received after January 1st, 1900. The entire evidence in the case, both on the part of plaintiff and defendant, in regard to the reception by defendant of plaintiff's cattle has relation therefore to the number of cattle received by and through said Bryson and Gober. It is a conceded fact in the case on both sides that all of the cattle received by Bryson in December, 1899, were immediately shipped from Curtis, Oklahoma, to the defendant in the stock yards in Kansas City, and were sold by the defendant in the stock yards in Kansas City upon the receipt of the same.

It is also conceded that the portion of the cattle received by Gober after January 1st, 1900, were shipped to and by the defendant sold at Kansas City, except that 210 of the cattle received by Gober were sold to him by the defendant. The testimony of Edmisson may be found from page 54 to page 80, and his testimony tends to show that the cattle delivered were driven through a gate and counted as they passed through that gate.

Edmisson testified that he put down the count in a book, but the book was not produced at the trial. His testimony, however, shows that after the cattle passed through the gate they were placed in the pastures of Herrington and Roberts, where the cattle remained for two days before being driven some 9 or 10 miles distant to Curtis, from which point they were shipped to Kansas City. The evidence of the other witnesses, shows that after these cattle, which Edmisson testified numbered 1,710 head, were thus driven and counted through that gate, which occurred one evening about twilight, and after the cattle were placed in said pastures of Herrington and Roberts, where they remained during the next two days, a considerable number of cattle which were driven there from said gate were cut out as not belonging to any of the Edmisson brand, but as belonging to neighbors, whose cattle had gotten into the Edmisson ranch. Edmisson says that the cattle were driven through this gate between 3 and 6 o'clock in the evening, and that the cattle in passing through that gate went two, three, four and five abreast.

Edmisson's testimony and indeed the testimony of all the witnesses shows that he was at Curtis when the cattle were shipped, and came with the cattle to Kansas City. Another witness in the case was E. F. Black, whose testimony may be found from page 95 to page 102. Black testified that there was a communication between the Herrington pasture and the Edmisson pasture; that he was with the cattle when they were being driven through the gate, and his count was 1,710 head that passed through the gate. Black also testified that the cattle after passing through the gate were turned into the Herrington pasture. Black further testified that these cattle, after they were counted, were turned into the Herrington pasture after being watered, and were turned

loose until the next morning, when they were rounded up and afterwards started to Curtis; that there might have been some strays in the Herrington pasture and they were driven to Curtis and cut out at Curtis. Black's testimony does not show that he was present, while, according to the testimony of the other witnesses, there were cattle cut out of the bunch while they were in the Herrington pasture the next morning after it was claimed they passed through and had been counted at the gate. The other cattle that were cut out, as testified to by him, were cut out at Curtis, but as we shall see further on, other witnesses testified that quite a number of cattle were cut out while they were in the Herrington pasture after they had passed through and claimed to have been counted at the gate.

Another witness for the plaintiff was M. M. Holman whose testimony extends from page 109 to 118. Holman testified that he was working with Bryson with these cattle in December, 1899, at the time they were gathered. He also testified as to the number of cattle that were originally counted when they were counted as 1,710 head. He said the count was made as they went through the gate. He says that after they had gone through the gate they were rounded up in the Herrington pasture and held over night in that pasture; that they remained loose in that pasture until the next morning when they were rounded up again, that is the second time. Holman further testified that they began to cut out some of the cattle in the Herrington pasture and that he left.

This appears from the following questions and answers:

"Q. How long did they remain loose in that pasture? A. Till the next morning."

"Q. What did you then do with them? A. Rounded them up again."

"Q. Then what did you do with them? A. They began to cut out some cattle and I left."

"Q. Under whose directions were these cattle cut out? A. Mr. Bryson's, I suppose, I cannot say for sure."

"Q. Did you aid in cutting them out? A. No.

"Q. State whether or not you know how many were cut? A. I do not.

"Q. Do you know what became of them, of those cattle, the cattle that were cut out of the herd? A. No."

Again at the bottom of the same page the witness testified as follows:

"Q. State whether or not you had anything more to do with this herd of cattle after you quit? A. Yes."

"Q. When? A. Next night."

This testimony shows, in connection, as we have already stated, with the testimony of other witnesses that a number of cattle were cut out of the bunch that had been counted the night before through the gate while the cattle were in the Herrington pasture and before they were driven to Curtis from which point they were shipped. If we can get the number of cattle that were cut out of the bunch while they were in the Herrington pasture, then we can get some idea of the number of cattle that remained to be and were shipped from Curtis. Again at page 111, the following testimony of Holman appears:

"Q. State, if you know, how many cattle were driven by Bryson from the Roberts' pasture to Curtis. A. I do not know.

Q. State, if you know, how many cattle were cut out of this herd in the Roberts pasture. A. I do not know.

Q. Do you know what brand was cut out in the Roberts pasture? A. No."

At the top of page 112 the witness, Holman, testified that the cattle when arriving at Curtis were placed

in a small pasture there and were turned loose and rounded up the next morning prior to shipment; that there were then cut out 10 or 15 head. So that, out of the cattle numbering, as witnesses say, 1,710 head that went through the gate quite a number were cut out in the Herrington and Roberts pasture, and also some were cut out at Curtis. These cattle were cut out at Curtis in addition, and Black testifies of still other cattle that were cut out at Curtis. The reason for the cutting out of these cattle is explained by the circumstances shown by the testimony of all of the witnesses that Edmisson's range was an open one covering a large territory and his cattle had gotten scattered over a large space of country and other cattle belonging to other people had become mixed with his. And it was the result of all this that the parties had to separate the cattle before the final shipment from Curtis and these several separations of other cattle from the Edmisson cattle were made after the count through the gate to which Edmisson, Black and Holman referred in their testimony. Holman testified that the count at the gate was for "curiosity" more than anything else. (p. 113.) The count through the gate does not seem to have been treated by the parties as the official count that was made to determine the number of cattle belonging to Edmisson that he was delivering to the defendant. Holman says that he just counted the bunch as they passed through the gate to satisfy his own curiosity; that he does not know how many calves there were in the bunch; that the count of 1,710 head was made between sundown and dark. Again, at page 113, Holman testifies that he is not sure that all the cattle that were counted through the gate were in Edmisson's brand. This statement of Holman is entirely consistent with his testimony elsewhere and the testimony of the other witnesses showing that cattle of other parties were

cut out while the bunch were in the Herrington pasture and also at Curtis. Holman testified that he did not know the brand of the cattle that Bryson cut out of the Roberts pasture. Then at page 117 the following question was asked and answer given by Holman:

"Q. State whether or not in your best judgment there were 1,710 head of these cattle driven from the Roberts pasture to the half section pasture at Curtis? A. I'd rather not pass my judgment on it."

Eli Robrts also testified for the plaintiff. This is the same Roberts who with Herrington owned the pasture into which the cattle counted through the gate were turned and in whose pastures they remained nearly two days after being counted through the gate.

Roberts testified (p. 88) that he had about 400 head of cattle in his pasture at the time that these Edmisson cattle were turned in there. It will be remembered from the testimony to which we have referred that the Edmisson cattle were rounded up twice in the Herrington and Roberts pasture after being turned in that pasture. His testimony shows that some of his cattle got mixed in with the Edmisson cattle; that there was communication between Edmisson's pasture and the Herrington and Roberts pastures, and whether these cattle had gotten mixed in with the Edmisson cattle while they were in his own pasture and before the count through the gate or after they were turned into the Herrington and Roberts pasture, the evidence does not show. Roberts was called upon to estimate or guess the number of the Edmisson cattle that were driven from the Herrington and Roberts pasture to Curtis, and he gives it as his estimate or guess that there were 1,600 or 1,700 head. He says that he never participated in any actual count of the cattle. One of the principal witnesses for defendant was J. F. Bryson, who received and

collected the cattle turned over to defendant in December, 1899. His testimony extends from page 143 to 171. It appears from the testimony of Bryson that he received from the plaintiff, Edmisson, a number of cattle for shipment and sale to defendant at Kansas City, the proceeds to apply upon the mortgage indebtedness of Edmisson to defendant. These cattle were received just prior to November 22nd, 1899, the date of said contract. At the time of receiving these cattle by Bryson, which is prior to the making of this contract, Bryson, according to his testimony, made a complete count of all the cattle of Edmisson on his ranch. The mortgages of defendant covered all of Edmisson's cattle and at that time defendant thought proper to send Bryson down to make the count of all of Edmisson's cattle.

Bryson gives the result of that count, and at page 144 to 147 he gives the correct and total amount of the count of all the cattle on the Edmisson ranch as 2,578 head. In giving this total of 2,578 head Bryson, however, from that number makes the deduction of 214 head. He explains in his testimony that these 214 head were turned back and counted the second time. Deducting these 214 head from the total of 2,578 leaves 2,364 as the total of all of the Edmisson cattle on the ranch at that time. Then Bryson testified that of this 2,364 head there were shipped to the defendant at Kansas City at that time 796 head. Deducting this 796 head from the 2,364 head, which was the total of all of Edmisson's cattle, we have 1,568 as the total number of the Edmisson cattle at the time he made his contract of November 22nd, 1899. In this connection it will be observed that the contract itself indicates an uncertainty in the mind of Edmisson himself as to whether he had more than 1,900 head of cattle on his ranch which was an open one covering a large territory. When he made that contract,

as the terms of that contract show, he thought he had at least 1,900 head and the contract was made so that if he had just that number and no more and delivered that number to the defendant that delivery would wipe out the balance of his large mortgage indebtedness. If it turned out that he had 2,100 then the delivery of 2,000 head of cattle would have the same effect. The testimony of both Edmisson and Bryson shows that when Bryson made this shipment of 796 head, just before the contract of November 22, 1899, Edmisson accompanied Bryson to Kansas City, and while Edmisson was in Kansas City at that time he and Maj. Drumm of the defendant company, made the contract of November 22, 1899. Bryson immediately returned with Edmisson and gathered the cattle together, which were shipped as we have already seen by Bryson in December, 1899. Bryson testified as to the number of cattle which he gathered on his return to the Edmisson ranch after the making of said contract. He testified that the only real count with a view of ascertaining the exact number of cattle shipped that was made was made at Curtis, the point from which the cattle were shipped.

Bryson gives the number of the count of the Edmisson cattle shipped at Curtis as 1,556 as the total amount of cows, calves and all sorts of cattle of all ages. Bryson gives an account of what took place with this round up of Edmisson cattle for shipment after the contract, and he explains how other people who had some cattle mixed in with the Edmisson cattle came into the Herrington and Roberts pasture and joined in the cutting out of their cattle from the bunch which had been counted the night before through the gate. Bryson says 200, or he should judge may be 150 were cut out in these pastures before the herd started on again to go to Curtis. If we take this number that was cut out there

as 150 and deduct this number from the 1,710 which Edmisson, Black and Holman testified had passed through the gate the night before, we have 1,560 head which is only four more than the number of cattle which Bryson testified he counted on actual count at the station at Curtis before the cattle were shipped. We have seen that the testimony of all the witnesses agree that quite a number of cattle were cut out from the Edmisson bunch while they were in the Herrington and Roberts pasture. Bryson, who was present when that cutting out was done, fixed the number at not less than 150. This number that was cut out there according to the testimony of all the witnesses explains the difference between the number of 1,710, which Edmisson, Black and Holman guessed or counted as the number which went through the gate and the 1,556 which Bryson says was the actual count of the cattle at Curtis. In this connection it must be remembered that Bryson was engaged in this work of gathering, counting and shipping these cattle from about the 23rd of November, a day or two after the making of the contract in Kansas City, until December 9th, when he made the shipment of the cattle to Kansas City. His testimony shows how thoroughly he did his work and how thoroughly familiar he was with all of its details, and his testimony shows that the only true, actual count that was made of the cattle was made by him at Curtis resulting in the count of 1,556 head as already stated.

This count of the cattle by Bryson is verified by the testimony of John L. Runey, whose testimony may be found from page 189 to 203. Runey was and is a yardman of the defendant in the Kansas City stock yards and he testified that he counted under the special instructions of the defendant the cattle of Edmisson that were received by the defendant that had been shipped by Bry-

son from Curtis. There is no controversy in the case that the number of cattle received by the defendant at the Kansas City stock yards in December, 1899, was the same number that had been received in the Territory by Bryson from the plaintiff and shipped at Curtis. There is no possibility of Runey being mistaken about the number of cattle thus received. He counted the cattle as they were received into the Kansas City stock yards and his testimony is explicit that there was 1,250 cattle and 243 calves, making altogether 1,493 head. It should be explained in this connection that 67 head of the cattle that had been started for shipment at Curtis were detained by the sheriff on account of a charge for taxes against these cattle in Edmisson's hands, which 67 head were afterwards received by the defendant and made the 1,560 in all. That is, adding these 67 to the 1,250 cattle and 243 calves which came in the first shipment as testified to by Runey, we have altogether 1,560 cattle. This is within 4 head of the number of cattle which Bryson testified he counted at Curtis and shipped from that point. At page 200, Runey testified that the count of the Kansas City Stock Yards Co., who received these cattle from the railway company, tallied with his count. In other words, his count agreed with the count of the Kansas City Stock Yards Company.

We submit that this review of the testimony shows conclusively that the number of cattle received by the defendant and shipped from Curtis to Kansas City and sold in Kansas City in December, 1899, was 1,556 or 1,560 head instead of 1,710 head which Edmisson, Black and Holman testified passed through the gate, but of which, as we have seen, the testimony shows about 150 head were taken and cut out while the cattle were in the Herrington and Roberts pastures.

Passing now from the cattle received in December,

1899, through Bryson to those afterwards received by Gober, the plaintiff, Edmisson, testified respecting the cattle received through Gober, that after the delivery of the cattle to Bryson in December, he, Edmisson, rounded up and tendered 350 or 400 head. He testified that the balance that he rounded up he offered to deliver to Bryson, but that Bryson did not come and receive them. At this point it is worthy of consideration that if Edmisson had delivered 1,710 head to Bryson he could not have tendered to Bryson 350 or 400 additional head because that would have given the defendant 2,110 head of cattle altogether in satisfaction of a contract which only called for 2,000 head. As will be seen by reference to his evidence, Edmisson is positive that the balance of his cattle that were rounded up after the shipment of the Bryson cattle, were about 350 or 400 head. He says that in July or August, 1900, he went through Gober's pastures and counted aitogether 575 head. He testified that at that time, there were other cattle of other brands than those of Edmisson in Gober's pasture, that there were some cattle there branded TV; that he does not know how many cattle in the Gober pasture were branded TV, and that it would be a hard matter for a man to estimate about how many TV cattle were in that pasture. Edmisson says he did not round up the cattle and did not cut out all the different brands; that he just rode up and down the creek across Gober's pasture; that he did not see all of the cattle in Gober's pasture. The mode by which he estimated that there were 575 cattle in the Gober pasture is shown by the testimony of the other witnesses.

Another witness of the plaintiff as to the number of cattle that were received by Gober, is John F. McFadden, whose testimony extends from page 80 to 86. Mc-

Fadden testified that he was in Gober's pasture between the 1st and 10th of May, 1900; that he saw some cattle with the Edmisson brands on them in Gober's pastures at that time, and on being asked how many cattle he saw in the Gober pasture of Edmisson's brand in May, 1900, he answers as follows: "A. My estimate would be about 575." McFadden explained how he came to make this estimate as follows: "Q. State how you came to be looking at this brand and mark on these cattle at that time."

"A. I was looking for some grass, and drifting through that part of the country, I run onto this bunch of cattle directly after they came off from feed. The X-2-Bar cattle were branded in my ear mark, which directed my attention to them particularly. They were bunched, just had been turned loose. I rode through them and examined them, looking for my interests."

McFadden shows that he never counted said cattle but merely made an estimate of them. In answer to a question by the Court this witness answers as follows: "A. Positively, I do not know, only an estimation." McFadden, testified that there were other cattle with other brands in the Gober pasture mixed in with the Edmisson cattle. McFadden explains how he came to make this estimate as follows:

"A. I met a party, a rider, possibly a mile from this bunch of cattle, and we were talking about the range and grass and I told him my business, stranger to me, and I was a stranger to him, and I asked him if he could tell me where a nook was down there—supposed to be a section of country enclosed, with one end wasn't closed, or a neck I think he called it, and he said he guessed I was in it. He stated there was a bunch of cattle throwed in there that day of that number."

J. M. Barclay, who was another witness for defendant, testified that he assisted Gober in gathering the Edmisson cattle. He counted 234 head of Edmisson cattle

on feed in Gober pastures. The testimony of said J. R. Gober may be found from page 121 to 134. Gober testified that all the cattle that he gathered numbered 336 head; that he tally branded the cattle in the early spring and that 10 head were taken out by mistake as belonging to other parties, making a total which he gathered of the Edmisson cattle of 326 head; that these cattle were found at different places, some of them in other counties through which Edmisson had scattered the remnant of the cattle, and the testimony of Barclay and Gober shows the efforts they made in gathering these little bunches of Edmisson cattle at the different places where they had been scattered by Edmisson. Gober explained that of the 326 head of the Edmisson cattle, which he thus received, he bought 210 head from the denfendant in the following July or August, 1900, and that the balance of the 326 head he shipped to the defendant at Kansas City. He explained, however, that out of this 326 head about 17 head of cattle had died during the preceding winter, but his testimony shows that he received altogether of the Edmisson cattle 326 head. He explained that he had on his range other cattle besides the Edmisson cattle. Gober explains and gives the different brands of other cattle besides the Edmisson cattle that were in his pasture, and he answers one of the questions on this subject as follows: "A. I had some of the brand Lazy S and some what we call a ————7, some with TV and some with Cross L, these were Smith and Chadburn's cattle, about 425 head of those." He says that he had altogether in his pasture about 700 head. If we deduct from the 700 head, which was the total number in his pastures, the Chadburn cattle, about 400 head, we have a balance of 300, and his testimony shows that by actual count the Edmisson cattle numbered, as we have seen, 326 head. We have thus summarized all of the testimony

and we submit that that summary shows that the number of cattle delivered in December, 1899, through Bryson, was 1,556 head and that the number received thereafter by Gober for the defendant was 326 head, making altogether 1,882 head. This is the total number of cattle which the uncontradicted evidence in the case shows the defendant received.

The jury found that the defendant received altogether 2,284 head of cattle. This finding by the jury of 2,284 is based upon the claim of plaintiff that the number of cattle delivered and shipped by Bryson to Kansas City was 1,710, the number of cattle counted through the gate, and that the number of cattle received by Gober was 575 head, which was the number guessed at and estimated by Edmisson and McFadden as they were going through the pastures where the cattle were, in July or August, 1900. We submit that the verdict of the jury that there were 2,284 head received by the defendant is wholly unwarranted by the substantial evidence in the case, and that the substantial evidence in the case shows that the defendant received 1,882 head and no more, which was confessedly 118 less than the 2,000 to which the defendant was entitled under the contract.

We submit in conclusion on this point that the verdict and judgment should be reversed, and set aside as not supported by the substantial evidence in the case and as being founded on conjecture, estimate, guess, passion and prejudice.

II.

The Court erred in rejecting the books of account kept by the defendant and showing the number of Edmisson cattle sold by the defendant in December, 1899. The testimony of Bryson and Runey as we have seen, shows that the cattle that were shipped from Curtis were

all received by the defendant in the Kansas City stock yards and sold, and the testimony of Runey, who gives the count of the cattle the same as Bryson and also the same as the Stock Yards Co., testified that when the cattle were counted and weighed in the Kansas City stock yards, the scale tickets were by him taken and given over to the bookkeeper of the defendant company, who at that time was John L. Burnett, whose testimony was given in the case for the defendant and which testimony may be found from page 180 to 189.

The testimony of the bookkeeper, Burnett, who kept the sales book of the defendant company, shows that he entered in the regular course of business the number of the Edmisson cattle received in December, 1899, and sold by the defendant. Copies of these accounts from the sales book may be found at pages 204 and 205. Burnett explains in his testimony that these entries were made at the times of the transactions and that they were made from the scale tickets furnished to him after the cattle were weighed and that the prices of the cattle were extended on these scale tickets and delivered with the invoices to the purchasers of the cattle. The entries which were offered in evidence in connection with his testimony were made from the scale tickets thus delivered to the purchasers, and those entries constitute the original and only book account evidence of the transactions. Notwithstanding the fact that those entries in the books were made by the bookkeeper of the defendant at the times of the transactions and sales and in the regular course of business, and notwithstanding those entries showed that the number of cattle as given by the testimony of Bryson and Runey were correct, the Court excluded this evidence and refused to allow it to be admitted to the jury and the defendant excepted. (p. 182.) In this exclusion we contend that the trial court erred.

Those original entries by the bookkeeper in the books of account of sales were original evidence. That evidence showed definitely and with certainty the exact number of cattle which had been shipped and received and sold by defendant through Bryson in December, 1899, and that the total number of those cattle was 1,556 and not 1,710 head. There is a statement of the entire number of cattle received by the defendant, including those received after November 22nd, 1899, to be found at page 19 of the record. That statement shows that on December 7, 1899, the cattle received by defendant were 1,246 cattle, 243 calves, and on December 11, 1899, 67 head. This 67 head was the number detained out of the cattle originally shipped on account of the claim for taxes and were, after the payment of the taxes, again sent forward. The total number thus received December 7th and 11th, 1899, was 1,556 head.

This is the number testified to by Bryson and by Runey and is the number shown by said book account of sales of the defendant. The Court had been permitting guesses and loose estimates to be made by the plaintiff's witnesses all along, as to the number of cattle, and, we submit, erred most grievously against defendant in excluding said books of account which reliably showed the exact number. Said books were admissible under Section 4277, page 827, of the Statutes of Oklahoma for 1893, which section reads as follows:

"Entries in books of account may be admitted in evidence, when it is made to appear by the oath of the person who made the entries, that such entries are correct, and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of the person who made the entries, in case of his death or absence from the country."

In view of this section of the Oklahoma statutes in regard to evidence in the Oklahoma Courts it seems to

us that nothing could be plainer than the error of the Court in this case in the exclusion of defendant's said books of account from the evidence. In the case of *Kessler* v. *Cheadle*, 12 Oklahoma, page 489, l. c., 494, the Court, in an opinion delivered by Judge Hayner, said:

"The fact that the coal was charged on the books and delivered to the Palace Laundry was competent evidence to show that the sale was made to it and upon its credit."

In addition to the foregoing observations as to the exclusion of said books we desire to refer to the decision of the Kansas City Court of Appeals in the case of *Drumm-Flato Com. Co.* v. *Gerlach Bank*, 81 S. W. Rep., page 503, l. c., 505. That was a case as will be seen from the report of it involving the same facts that are involved in this case. Said contract of Nov. 22, 1899, was one of the issues in that case, and one of the issues in that case was the further question as to the number of cattle received by Drumm-Flato Co. from Edmisson after said contract of Nov. 22, 1899. The trial court in that case admitted in evidence the identical books and entries which the trial court in this case excluded. Concerning the propriety of the trial court in admitting the books and entries in that case in evidence which action of the trial court the Appellate Court approved, the Appellate Court in its opinion says:

"The defendant contends further that the Court committed error in admitting in evidence entries in the plaintiff's books showing the number of cattle which had been received by plaintiff subsequent to the contract of November 22, 1899. It appears from the testimony of the witness, Burnett, who was plaintiff's bookkeeper, that the entries made by him in plaintiff's books were taken from the scale tickets; that the usual way of making the scale tickets was from the weighing of the cattle, and at the time of the weighing he furnished with the scale tickets showing the sale, and all the figures, and then,

after making the entries in his sale book, the scale tickets were turned over and delivered to the buyers of the cattle. In this way the entries in the sale book became original entries and were admissible in evidence, under the rule announced in *Wells* v. *Hobson,* 91 Mo. App., loc., cit., 385-386; *Nelson* v. *Nelson,* 90 Mo., 460; 2 S. W., 29; 33 Am. St. Rep., 510; 9 Am. & Eng. Ency. of Law (2d Ed.), 901. Remaining authorities on this point in defendant's brief." See also *Chaffee* v. *U. S.,* 18 Wall., 516, l. c., 541.

III.

The Court in this case erred in its instruction to the jury on the subject of interest. The instruction given on the point of interest is No. 7 to be found at page 247. That part of said instruction No. 7 directed to the jury on the subject of interest is as follows:

"Under our statute and laws, the detriment caused by the wrongful conversion of the property of another, as applicable to this case, if you find there was a conversion is the value of the property at the time it was taken with seven per cent interest thereon from that date until the present time. In other words, gentlemen of the jury, if you find that the defendant did take the cattle of the plaintiff in a number in excess of the amount mentioned in the contract, then the plaintiff is entitled to recover in a sum which is the value of the excess so taken, and interest thereon from the time taken until the present time."

Defendant excepted to each instruction (p. 251).

This instruction is regard to interest is repeated in the 8th instruction to the jury given by the Court at page 248, Record. In thus peremptorily directing the jury to give interest at the rate of 7 per cent on the value of the cattle the Court committed error. This question is important owing to the fact that a considerable part of the verdict herein is for interest.

In Chap. 26 of the Oklahoma statutes, page 534, relating to damages, section 6 of that statute being section 2614 of the Revised Statutes of Oklahoma for 1893, authorizes a jury to give interest in actions by a creditor against a debtor. Section 7 of that chapter, being Section 2615, reads as follows:

"In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud or malice, interest may be given *in the discretion of the jury.*"

This action is an action of trover and is not an action *ex contractu.* This is not an action for the breach of an obligation arising out of contract. This, in the language of Sec. 7, is a cause of action for the breach of an obligation not arising from contract. We submit that it is clear that under said section 7 of the Damage Act of Oklahoma, it is not proper, in any action of trover, replevin, or like form of action, for the Court to tell the jury specifically and peremptorily to award damages by way of interest. The Court can only give a peremptory instruction to give damages by way of interest where the action is *ex contractu* under section 6, where a creditor sues his debtor for a debt. In the Missouri damage statutes there is a section of the law similar to section 7 of the Oklahoma statute. This Missouri statute is Section 2869, Vol. 1 of the Revised Statutes of Missouri of 1899, and reads as follows:

"The jury, on the trial of any issue or on any inquisition of damages, may, *if they shall think fit,* give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure."

The wording of this section is not the same as the corresponding section in the Oklahoma Statutes above cited, but the meaning is the same. In the Missouri

Statute the provision is that the jury may *"if they shall think fit,"* while in the Oklahoma Statutes interest may be given *"in the discretion of the jury."* The meaning of the two sections is the same. The Missouri section which we have quoted above, was construed by the Supreme Court of Missouri in the case of *State ex rel. Robinson* v. *Hope*, 121 Mo., 34. In that case the Court held that a peremptory instruction in an action for conversion of property to award damages by way of interest was erroneous, and that it was discretionary with the jury whether they would give damages by way of interest or not. In that case the evidence showed distinctly the value of the goods which were the subject of controversy, and that evidence of value taken in connection with the verdict showed the amount of interest included in the verdict definitely, and the Supreme Court as a condition for affirming the judgment ordered a remittitur of the amount of interest and affirmed the judgment for the balance.

That course cannot be followed in this case for the reason that the Court cannot know in this case what valuation the jury placed upon the 284 head of cattle for which the verdict was given, and since there is nothing in the record in this case to show the value definitely of that 284 head, which the jury found, it cannot be determined how much of the entire verdict of $7,436.06 is composed of interest. Therefore, on this ground alone, the verdict and judgment are erroneous and should be set aside and reversed. This court has several times decided that in actions of tort interest is only allowable in the discretion of the jury. *Lincoln* v. *Claflin*, 7 Wall., 132, l. c., 139; The Scotland, 118 U. S., 507, l. c., 518; *District* v. *Robinson*, 180 U. S., 92, l. c., 107.

IV.

The Court also erred as to the special interrogatory No. 5 asked by defendant. The interrogatories asked by the defendant and given by the court may be found at page 255. Said interrogatory No. 5 is as follows: "How many Edmisson cattle did J. F. Bryson ship from Curtis to Kansas City?" The jury answered said interrogatory as follows: "Not sufficient evidence to determine."

When the verdict of the jury was returned into court with the interrogatories and with this No. 5 thus answered, defendant by its counsel asked the court to direct the jury to retire and answer said interrogatory. This appears from page 254 of the record as follows: "In order to save the record the defendant moves the "Court to resubmit to the jury question No. 4. Is that "it, no it is not 4, it is 5, question No. 5 of the special "interrogatories, which reads as follows: How many "Edmisson cattle did J. F. Bryson ship from Curtis to "Kansas City? The Court will decline to submit the in-"terrogatory." To which ruling of the Court the defendant excepts, and thereupon the Court discharged the jury. (p. 254.) We submit that in refusing to resubmit said question No. 5 to the jury and in refusing to require the jury to answer the same the trial court committed error. The court decided that said question 5 was a proper question to be submitted to the jury in the first instance. This Court can see from the statement we have made that it was a material question in the case for the jury to determine the number of cattle Bryson shipped from Curtis to Kansas City in December, 1899.

As it is conceded and not denied that the number of cattle delivered to Bryson was the same as the number shipped and sold, that was a vital issue in the case be-

cause it determined the number of cattle that Edmisson delivered to Bryson and received by defendant in December, 1899. That question No. 5 involved the inquiry whether the number, respecting the Edmisson cattle delivered to Bryson was 1,710 head or 1,556 head. There is no pretense and could be none in view of the evidence that the number of cattle received by the defendant from Edmisson through Bryson was any different, greater or less number than were shipped by Bryson from Curtis to Kansas City. Therefore, this question No. 5 was the vital and turning point in the case so far as the Bryson December, 1899, cattle were concerned. The provision of the Oklahoma Code in regard to these special questions is to be found in Section 4176 of the Revised Statutes of Oklahoma for 1893, being Sec. 298 of the Civil Code, which reads as follows: "In all cases the jury shall render a general verdict and the Court shall in any case at "the request of the parties thereto, or either of them, "in addition to the general verdict, direct the jury to find "upon particular questions of fact to be stated in writing "by the party or parties requesting the same."

It is understood that this section of the Statutes of Oklahoma is taken from the corresponding provision of the Kansas Code. The provision in the Kansas Code is Sec. 4733, Dassler's Statutes of Kansas, 1901, and reads word for word the same as the above quoted section from the Oklahoma Code. It is a well settled rule in all code states where this sort of provision is to be found, that it is the duty of the trial court to submit all questions asked by the parties on material points in the case to the jury for their answer, and that the parties have the right to require answers to all such questions submitted by the court. We will simply content ourselves to refer to the Kansas decisions supporting this contention:

Bent v. *Filbrick,* 16 Kas., 190;

Railway Company v. *Fechheimer*, 36 Kas., 46, l. c., 50;
Railway Company v. *Townsdin*, 38 Kas., 78;
Hulme v. *Diffenbecker*, 53 Kas., 181;
Walker v. *Brontner*, 59 Kas., 117, l. c. 126;
Railway Co. v. *Ayers*, 56 Kas., 176.

The case of *Railway Co.* v. *Hale*, 64 Kas., 751, is precisely in point in this case. In that case the Kansas Supreme Court held that where the court submits special questions to the jury involving the existence or non-existence of certain facts to which the jury answers by saying "do not know" and one of the parties request the court to retire the jury and resubmit the question and require it to answer, it is error to refuse such request.

The exact error that was condemned by the Kansas Supreme Court in that case is the precise error that was committed by the trial court in this case. There was no excuse for the jury in this case to say that it could not find the number of cattle that were shipped by Bryson to the defendant, as required by interrogatory five. The jury contented themselves by saying "not sufficient evidence to determine." If the jury could say that in this case it could say it in any other case, and it could say it as to all of the questions that might be propounded to it. There was ample evidence in this case, even if we leave out of question the books of account excluded by the trial court showing and proving the number of cattle that Bryson shipped from Curtis to Kansas City. His own testimony showed 1,556 head. The testimony of Runey, who counted the cattle in Kansas City, shows the same number of 1,556 head. There was, therefore, sufficient evidence in the case and admitted by the Court upon which to make a distinct and explicit answer to that question. The jury possibly may have felt that an answer to that question might have some effect upon their general

verdict. As will appear from pages 251-252, the Court had remarked in the presence of the jury, the effect which an inconsistent answer might have upon the general verdict, and the jury may have had this inconsistency in their mind when they refused to answer said question. But whatever may have been in the minds of the jury, it was certainly error for the trial court to refuse the request of the defendant to resubmit said question to the jury and require it to be answered. It was not discretionary on the part of the trial court to thus refuse.

V.

It is difficult at first blush to conjecture upon what ground or how the jury found their verdict in this case that the defendant ever actually received the number of cattle in excess of 2,000 to which it is entitled under the contract. Of course the defendant being a Missouri live stock corporation engaged in business at the Kansas City stock yards, a jury in a distant state or territory would be expected perhaps to render such a verdict as was given in this case, but as we have seen, there is no substantial evidence in the case justifying the verdict. How was that verdict procured? Let us look a little more into the record and endeavor to ascertain. At the bottom of page 101 in the testimony of Black appears the following: "Q. State, if you know, how many cattle were in the portions of the pasture you did not work. A. I think there must have been about 700 or 800, *that is guessing.*"

The defendant moved that this answer be stricken from the consideration of the jury as incompetent, irrelevant and immaterial and not responsive to the question. This objection by the defendant was overruled by the court and defendant excepted, and then the court summarized this objectonable testimony of the witness by

the following remarks in the presence of the jury: By the Court: "He says he thinks there was 700 or 800 head." (P. 101.) The guessing part of the answer was omitted by the court. During the testimony of the witness, Gober, and at page 130, there was a running colloquy between the court and counsel as to certain points in the testimony, and the court used the following language: By the Court: "You will have to show that fact before you can claim anything under the mortgage. You made a subsequent contract here, which is binding on both parties, when you bought the cattle. Now you cannot use one horn of the dilemma *by taking* 1,710 *head,* and turn round and repudiate the contract without placing the parties in *statuo quo.*"

We submit that there was error in these remarks of the court in the presence of the jury assuming, as that remark did, that the defendant had taken 1,710 head, as being the number of cattle delivered by Edmisson to Bryson. This was a disputed issue in the case and any instruction of the court to the jury or any remark of the court in the presence of the jury assuming that the defendant in regard to the cattle received through Bryson had received 1,710 head was certainly erroneous and that remark was highly prejudicial to the rights of defendant.

Again at page 132 in the testimony of Gober it appears that Gober had testified that the number of Edmisson cattle, which the defendant had sold to Gober and which constituted a part of the 326 head of cattle which he gathered, was 210 head. The evidence of Gober in this connection shows that Mr. O. G. Young, one of defendant's attorneys, had gone to Oklahoma to make this sale, representing defendant, and that Mr. Young had counted at that time 210 head of the 326 as the cattle which were sold to Gober. There was an objection to this evidence by the plaintiff whereupon the following

remark was made by the court: By the Court: "I don't suppose you would be bound by it at all." This remark by the court was equal to saying to the jury that that evidence did not amount to anything. Again at page 137 the court made the following remark in the presence of the jury: By the Court: * * * "The only thing that this witness has testified to, so far as the court can see, is upon exactly the same matters the plaintiff himself has testified. Possibly there may be this bunch over east that he did not testify to, that one bunch, so why is there any dispute about this witness's testimony?"

Again at pages 144 to 147 it appears, as we have already seen, that Bryson gave the total number of cattle on Edmisson's place as ascertained by a count made by him just before the making of the contract on November 22, 1890. He gave the total number on the Edmisson ranch, just before that contract by actual count, and his evidence shows that the November shipment to the defendant that was made out of these cattle was 796 head, leaving about 1,600 head there at the time that contract was made. This November shipment was made November 21, 1899. That is the day the cattle were received at Kansas City, and on the day following, November 22, the contract was made. The count, which was made by Bryson, as testified to by him, was made on November 19. This testimony was introduced by defendant and received by the court and heard by the jury. This testimony was introduced by the defendant for the purpose of showing the number of cattle that Edmisson had on his entire ranch at the time of making the contract as having some tendency to show the number of cattle which he thereafter delivered to Bryson. The testimony of Bryson on this point is very strong and positive. But without any objection from the plaintiff's counsel, the court, after this testimony of Bryson

was introduced to the jury, made the following remark:

By the Court: "Now, you have gone into this testimony, I would like to ask why it is necessary. I do not think either side ought to go into it. I do not see what figure this cuts." (Pp. 147-148, Record.)

Then there was a running argument between the court and defendant's counsel upon the point thus suggested by the court, all in the presence of the jury (148-149). The contention by defendant's counsel was that this evidence should be considered by the jury as having a tendency to show the number of cattle that Edmisson had to deliver under that contract. Then the court remarked in the presence of the jury as follows: By the Court: "But how does this testimony tend to prove that fact?" The court further said in this connection: By the Court: "That is a mere speculation, and that is what the court is trying to avoid. It does not follow." (P. 148.) Again, on the same page: By the Court: "Oh, no, this is entirely before this contract and does not amount to much more than a conclusion in this case."

We respectfully submit that these remarks by the trial court were highly prejudicial to the rights of defendant, were improper and ought not to have been made by the court in the presence of the jury. Again, as further criticising this testimony by Bryson of his count of the entire number of cattle of Edmisson on his ranch on November 19, 1899, the court at page 149 says: By the Court: "He came back here and went to work with these cattle and knows how many cattle were counted out. That testimony is perfectly competent. I do not see how the jury can draw any conclusion, or figure out of the number of cattle from this testimony."

It will be remembered in this connection that the court had already received several guesses and loose

estimates by different witnesses for the plaintiff as to the number of these cattle. One witness had been permitted to give guess and estimate based on what somebody else had said was the number of cattle in the Gober pasture. But here we have the direct and positive testimony of Bryson as to the number of cattle of Edmisson on his ranch at the time of the making of this contract followed by other testimony of Bryson showing that he immediately returned after the making of that contract to the Edmisson ranch to gather the cattle that were to be delivered under that contract, and he was engaged from about the 23rd of November to the 1st of December in gathering the cattle, which he gathered after the making of that contract.

After all these prejudicial remarks of the court, plaintiff's counsel asked the court to withdraw from the jury the consideration of this testimony of Bryson as to the count on November 19, 1899, whereupon the court made the following remark: "Oh, no, the court has "raised this objection, but I have not raised it for the "purpose of striking it out. I will not allow my ob-"jection to go to striking out the testimony." If the testimony was of no account as having any tendency in the case then the court should have sustained this objection and stricken it out, but the court by this remark shows that the evidence was proper to be considered by the jury, but of what value was that evidence for defendant after those repeated prejudicial remarks of the court in the presence of the jury, which we have cited above, had been made? The court seems to have called up this matter on the motion of the court itself for the purpose of making some remarks, and having made those remarks the court left the evidence with the jury to be considered in connection with these remarks of the court. This is shown by the further remark of the court at

page 149. By the Court: "The court raised the propo-"sition, gentlemen, and counsel stated it was intended to "get at the number of cattle. The talk was back and "forth between Mr. Young and myself, and I made the "remark if this was calculated to throw light upon the "number of cattle, then it would be competent. There "was no objection to it."

Then again as a conclusion of the whole matter the court used the following language: "You may proceed "along the line the court has indicated, gentlemen. I do "not see anything in this to help the jury out. Just "wait a moment until I make a figure or two here, so "that I can see that I am right. Proceed now, we will "see what there is."

And thus the effect of this evidence which the court refused to strike out was destroyed utterly by these repeated prejudicial remarks from the court in the presence of the jury. Again at the top of page 157 the court in adjourning, informed the jury that this case had been tried once before and sent back from the Supreme Court. We are somewhat at a loss to understand why this remark of the court was made in the presence of the jury.

Again at page 191 in the testimony of John Runey appears the following question: "Q. Do you know about how many cattle there were of the above brands at that time?" An objection was made to this question, whereupon the court used the following language:

"That may all be, only if he knows what were there, "why would it not be competent to let him state for what "it is worth. *The thought has been running in the mind "of the court whether he knows that testimony of his "knowledge.*"

Of course after these remarks by the court it is very evident that the evidence of these witnesses in response to this question was not considered by the jury of

much value. The evidence of Runey was that he positively counted the cattle which were a part of his duties as they came into the Kansas City stock yards. He testified further that the Kansas City Stock Yards Co. also counted the cattle, and that his count and the count of the Stock Yards Co. agreed. As a further comment on his testimony the court at the top of page 191 says:

"He discloses from his testimony that he has some duty to perform in separating the cattle, geting them into the pens, receiving them second hand from other parties."

Again, on the same page, the court says: "No, certainly not, but if he knows how many there is there, it may be competent *for whatever it is worth.*"

This was undoubtedly taken by the jury to mean that in the opinion of the court the testimony received was not worth very much. Again on the same page, with reference to this important testimony of the witness the court further remarked:

"Whatever bearing this may have upon what cattle were delivered, it may go in; *the weight of the testimony, however, is for the jury.*"

Of course it is easy to see that the jury did not give any weight to the testimony after this line of remraks by the court. Again on the same page the court further remarked: "Yes, that only serves to weaken the testimony and does not go to its competency."

Of course, while the evidence still remained before the jury this last remark destroyed its effect utterly. The tendency of all of these remarks by the court was to indicate to the jury that the court did not think there was very much weight to be given to this evidence. When a court in receiving evidence overrules an objection to it and at the same time intimates that it is not

entitled to much weight, the court is usurping the province of the jury and taking away a very valuable right of a party litigant. The testimony of the witness, Runey, as to the number of cattle that came into the stock yards was vitally important to this defendant.

The court also made the following remark: By the Court: "I think it is competent, the weight of the testimony, however, will be for the jury."

This was equal to saying to the jury that the court did not think the testimony of much weight, but that it was competent for them to consider it. Again the court said: "It is certainly competent to some extent, but the weight of the testimony, what credit and what weight is to be given to it, that, of course, is for the jury and not for the court."

We submit that the trial court was not justified in making this remark in the presence of the jury.

At page 215 it appears that the court, towards the conclusion of the evidence, made the following remark in the presence of the jury: By the court: "Let me understand. I understood that your evidence shows that the count on these cattle in Kansas City by these different witnesses showed fifteen hundred and fifty-six head. In no place in the testimony do you say it includes these sixty-five or seventy head." The court here was again taking the place of the jury, and besides that was making a very serious and grievous mistake as to the evidence. The evidence of Bryson was that his count of the cattle in the stock yards at Curtis made out 1,556 head, but that 67 head was taken therefrom for the payment of taxes. The testimony of Runey shows that by his count of the cattle in the Kansas City stock yards there were 1,250 cattle and 243 calves, making altogether the number which he received and counted 1,493 head. The other 67 head is

shown in the book account which was excluded, but the defendant does not deny, but admits that it subsequently received the other 67 head after their detention by the sheriff. The point, however, in this connection is that we want to show that the court not only usurped the province of the jury in assuming that the court in the Kansas City stock yards showed 1,556 head, but that the court mistook the facts. The count at the Kansas City stock yards showed, as we have seen, 1,493 head. And the excluded testimony shows that afterwards 67 head were received. 1,250 head of cattle and 243 calves counted by Runey were received at Kansas City on December 7, 1899; the other 67 head which had been detained were received by defendant December 11, 1899.

The injustice and wrong to this defendant of the remark of the court at page 215 and 216 are too manifest to require further demonstration. Then, to clinch the matter, the court further on, on page 216, uses the following language: By the Court: "All the witnesses seem to be testifying of the two train loads that were shipped at that one time."

Then again, at page 216, the court persists in the error of his remarks.

We submit that these remarks which we have quoted from the record in this case and other remarks were very prejudicial and highly injurious to the defendant in the trial of this case. It is inconceivable that any fair-minded jury on the evidence in this case would have ever arrived at the verdict that was given, if the minds of the jury had been properly directed while the evidence was being received and by the instructions of the court.

VI.

We desire at this point to notice particularly some of the suggestions in the learned opinion of the Supreme Court of Oklahoma, in this case, which may be found from pages 265 to 271, Record. In the opening paragraph of the opinion, Judge Hainer, who delivered the opinion of the court, quotes certain remarks from Chief Justice Burford in the former opinion in this case (13 Okla., 440). Those remarks of Chief Justice Burford occurred on the first hearing of this case in the Supreme Court. This case was before the court at that time on a ruling of the trial court sustaining a demurrer filed by the Commission Company to the plaintiff's evidence at that trial.

None of the evidence of the Commission Company in the record now was contained in the record at that time. Only the evidence offered by Edmisson, including that of himself and Black, was contained in the record at that time, and the remarks then made of Chief Justice Burford, quoted in the opinion on the second hearing, and to be found at the bottom of page 266 and the top of page 267, had reference to the state of the record at that time.

The case at the first trial went off on the question of whether the agreement of November 22, 1899, was supported by a sufficient consideration, and the court in passing on that point speaks of the number of cattle as 1,710, which was the number of cattle shown on that trial to have passed through the gate; but the remarks, we repeat, of Mr. Justice Burford on that trial may be taken, insofar as the facts were concerned, as to the number of cattle, as having application solely to the law point then under consideration, and as not having any bearing upon the questions of fact gone into at the second trial.

Again, in passing upon the point as to the error of the court in rejecting the books of account kept by the Commission Company, the Supreme Court of Oklahoma in its opinion (p. 268, Rec.), said: "In this connection it must be borne in mind that the contract did not provide where the cattle should be delivered, and was wholly silent upon that question. The presumption of law, therefore, was that the cattle were to be delivered where they were located at the time the contract was entered into." And the court then proceeds to hold that under the contract of November 22, 1899, the cattle were delivered by Edmisson to Bryson on Edmisson's ranch in Oklahoma, and as a conclusion from that the court holds that the testimony of Burnett, the bookkeeper, and of the books of account were inadmissible as not being a part of the *res gestae* in the transaction of delivery.

We submit that the Supreme Court of Oklahoma is in error on this point. It is true that the contract of November 22, 1899, was silent upon the question of where the cattle should be delivered. But in this connection it must be borne in mind that that contract of November 22, 1899, was not an original undertaking, and did not take effect as extinguishing, but was supplemental to the mortgages of Edmisson to the Commission Company until the full delivery of 1,900 head of the mortgaged cattle. Notwithstanding said contract of November 22, 1899, the mortgages securing an indebtedness of about $57,000.00 from Edmisson to the Commission Company, continued in full force. The said contract did not operate of itself at once to extinguish the notes and mortgages which the Commission Company held, and if Edmisson did not carry out said contract of November 22, 1899, then it results that the notes and mortgages are still in full force. Said contract was executory in its character. Each one of the two chattel

mortgages of Edmisson to the Commission Company, which continued to operate until full performance of said contract, contained the following paragraph (pp. 220-226, Rec.): "When marketed, said cattle are to be shipped and consigned for sale to Drumm-Flato Commission Company, at the stock yards at Kansas City, and when sold the proceeds thereof shall be applied, first, in payment of the usual and customary commissions to said Drumm-Flato Commission Company for selling same, and the balance, or so much thereof as may be necessary, shall be applied on the indebtedness hereinafter described."

We submit that in this case when the contract of November 22, 1899, was made it was contemplated that the cattle should be shipped and sold the same as they had been under the above provision of the chattel mortgages. This is shown by what was actually done. The cattle which Bryson assisted in gathering in 1899 and immediately following the making of this contract, were immediately shipped out to the Commission Company at Kansas City, and sold the same as the other shipments and sales which had taken place under the mortgages prior to that contract. The course of dealing and conduct of the parties show that there was no difference made by the contract of November 22, 1899, with respect to the delivery, shipment and sale of cattle to and by the Commission Company.

The proceeds of the sales were not to be credited until the delivery of the 1,900, but the mode of delivery and shipment stipulated in the mortgages was not changed in the contract.

The rule invoked by the Supreme Court in that clause of its opinion where the Supreme Court says that, the presumption of law is that the cattle were to be delivered at the place where they were located at the time

of the making of the contract, applies to the place of sales. If no prior relation had been sustained between Edmisson and the Commission Company before the making of that contract, and if that contract had been a contract of sale by Edmisson to the Commission Company, of the cattle thereafter to be delivered, then the rule invoked by the Oklahoma Supreme Court, that the presumption of law would be that the delivery was to take place on Edmisson's ranch, might apply; but the contract in this case was made between a mortgagor and a mortgagee—the Commission Company was not an ordinary purchaser buying cattle. It is true that if Edmisson had delivered the full number of 1,900 head following the making of that contract, the legal effect would have been to have vested the title as a purchaser in the Commission Company to that 1,900 head; but the number delivered by Edmisson through Bryson was only either 1,556 or 1,710 head. In either event, that delivery did and does not, wipe out or extinguish the notes and mortgages. It still required more cattle; and whether the contract was or was not afterwards fulfilled by the offer to deliver or the delivery of more cattle, still the delivery of the Bryson cattle must be taken to have been made in the manner and form specified in the mortgages; that is, by shipment to the Commission Company, so long as the mortgages remained in force, and since the provisions in the mortgages above cited contemplated that the cattle were to be shipped and consigned for sale to the Drumm-Flato Commission Company at the stock yards at Kansas City, we submit that the books of account of sales kept by the Commission Company were admissible to prove the number of cattle shipped through Bryson and sold by the company the same as the books would have been admissible to prove the cattle that had been shipped in a prior shipment before the making of that executory contract.

In other words, that contract did not change the mode of delivering the cattle stipulated and provided for in the mortgages.

Another reason given by the Oklahoma Supreme Court in its opinion in this case (p. 269, Rec.) for upholding the action of the trial court in excluding the books of account of the Commission Company from evidence, is contained in the following language of that court: "There is still a stronger reason why the ruling of the court should be upheld. The defendant did not produce the books in court, nor was the book or the original entries therein attached to the deposition of the witness, Burnett. Hence we think it was clearly incompetent to attempt to prove the entries by permitting the deposition of the witness, Burnett, to be read to the jury as to the contents of the book. We know of no rule of evidence that would permit a witness to state the entries or the contents of a book account, unless the books are lost or destroyed."

We submit that this paragraph of the opinion of the Supreme Court is clearly erroneous. It is erroneous in a fact assumed. The deposition of John L. Burnett, the bookkeeper, was taken at Kansas City at the same time of the taking of the deposition of the yard man of the Commission Company, John Rune. Those depositions, from their caption to the final certificates, extend from page 180 to page 203 of the Record.

Following on page 203 the certificate of the notary who took those depositions is the following: "Said exhibits 'A' and 'B' attached to said depositions, are in words and figures as follows, to-wit:" Then there appears on pages 204-205 said exhibits "A" and "B," which are copies of the account of sales of said 1,556 head of cattle which were received and sold by the Commission Company on December 7th and December 11th,

1899, those exhibits "A" and "B" being copies of the books of the company kept in Kansas City, referred to in the deposition of Mr. Burnett at pages 183-185 of the printed record, as follows: "I now offer in evidence the entries on pages 415 and 418, giving the account sales of the cattle consigned by J. F. Bryson, Curtis, Oklahoma, to the Drumm-Flato Commission Company, December 7th and 8th, 1899, showing the sale of 1,250 cattle and 243 calves; and the account sales of cattle consigned by J. F. Bryson, Curtis, Oklahoma, to Drumm-Flato Commission Company, sold on December 11, 1899, 67 head of cattle." This is contained in the deposition taken at Kansas City. Then at page 185 appears the following: "Copies of said entries offered in evidence by defendant, on pages 415 and 418, respectively, given the account sales of the cattle consigned by J. F. Bryson to the Drumm-Flato Commission Company, and sold by said Commission Company on December 7th, 8th and 11th, are made by the notary public taking this deposition, from the sales book of said Drumm-Flato Commission Company, and said copies are attached hereto and made a part hereof and marked, respectively, 'A' and 'B.'"

It is thus seen that the assumption by the Oklahoma Supreme Court that the company sought to prove the entries in its books by the oral testimony of a witness is erroneous. The accounts identified by Burnett were copied and the copies returned as exhibits.

It seems to have been thought by the Supreme Court in its opinion in this case that this evidence was inadmissible because the Commission Company did not have present in court in Oklahoma the original books from which were taken those copies of the particular accounts in question, made by the notary public at the time of taking the deposition and transmitted therewith.

We know of no rule of law requiring a commission company, or any other concern, to ship away five hundred or a thousand miles from its place of business, its original books for admission in evidence. We have always understood the rule of practice to be that accounts may be proven by taking the deposition of the bookkeeper and having the books before the officer taking the deposition, and the account proven by the books and copies of the account made by the officer taking the deposition and transmitted and returned into court therewith. That was done in this case, and its seems to us that this reason assigned by the Oklahoma Supreme Court for the refusal to admit this evidence on the ground that the books were not carried from Kansas City to Alva, Oklahoma, is wholly indefensible. The deposition of the bookkeeper, Burnett, in connection with said exhibits "A" and "B" was certainly admissible in evidence, and the action of the court in excluding both, we submit, was error, and that error was vital in this case, because those books made absolutely conclusive, indeed, if the evidence already was not conclusive, that the number of cattle received through Bryson from Edmisson was 1,556 head and not 1,710 head.

The rule as to the admissibility of entries in account books in this class of cases, was settled by this court in *Chaffee* v. *United States*, 18 Wall., 516, l. c., 541. In that case this court adjudged that:

"The general rule which governs the admissibility of entries in books made by private parties in the ordinary course of their business, requires that the entries shall be contemporaneous with the facts to which they relate, and shall be made by the parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting if dead, or insane, or beyond the reach of the process or commission of the court."

In this case the proof of the entries in the books of the Commission Company was made by Mr. Burnett, who made the entries at the time of the transaction, and indeed as a part of the transaction; and his testimony, taken in connection with that of Mr. Rune, who testifies as to the actual number of cattle, shows that he testified to the actual number of the cattle, and the testimony of both was based on their actual knowledge, and agrees with the entries in the books, and the entries were made in the books at the time by Mr. Burnett, and those entries were based on the scale tickets which came from the weighing of the cattle, counted at the time they were weighed by the witness, Rune, and were founded on their actual knowledge.

It seems to us that nothing could be clearer than the error of the court in rejecting said books of account. Again, the court gave the same reasons given by it for the exclusion of the books of account, in support of the proposition decided by the court that there was no error in not requiring the jury to give an answer to said interrogatory No. 5 (p. 270, Rec.).

The court on this branch of the case, again repeats its error in assuming that the place of delivery of the cattle was on Edmisson's ranch. Even, however, if the court were right in assuming that the place of delivery of the cattle was on Edmisson's ranch, still if there is and can be no controversy that the number of cattle shipped by Bryson from Curtis to Kansas City was the same as the number of Edmisson's cattle which he received on Edmisson's ranch, the question in the case of the number of the cattle shipped from Curtis to Kansas City was material, and, therefore, the books of account were admissible for the purpose of showing that fact, and, therefore, interrogatory No. 5 to the jury was material.

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At the top of page 271, the Supreme Court said:

"The testimony of Bryson as to the number of cattle that were shipped from Curtis to Kansas City, was allowed to go to the jury as a circumstance tending to corroborate him as to the number of cattle that were delivered by the plaintiff to Bryson as the agent of the company. Likewise, the testimony of Rune, the employe of the defendant company at the stock yards at Kansas City, was allowed to go to the jury for the same purpose."

If the court was right in this, then we submit that the books of account were also admissible, and that interrogatory No. 5 was material. If, as the Oklahoma Supreme Court admits the testimony of Bryson and Rune was admissible to prove the number of cattle shipped from Curtis to Kansas City, then the books were admissible for the same purpose. Finally, the Supreme Court says that the objections as to the remarks of the learned trial judge, during the trial, in the presence of the jury, are unavailing for the reason that no exceptions were saved thereto by the Commission Company while those remarks were being made. The point of those remarks of the trial judge, made by the Commission Company, is that it did not have a fair trial. It is undoubtedly true that points as to the admissibility or rejection of testimony at the trial and points relating to the conduct of any witness or of an attorney, or of the conduct of the jury, can be only based upon exceptions made during the trial; but where the objection is as to the repeated remarks of the trial judge in the presence of the jury, the rule requiring exceptions to be taken at the time ought not to be insisted upon. Reversals have taken place for remarks of the trial judge, prejudicial to the rights of the appellant, regardless of any question of exception at the time. Litigants do not ordinarily care to object and except to remarks of the trial judge while the trial is proceeding. The making of such ob-

jections and exceptions would ordinarily be as prejudicial to litigants as the remarks objected and excepted to.

If the Commission Company in this case did not have a fair trial, it ought to have the benefit of that fact in the consideration of the exceptions argued on this hearing. The remarks of the learned trial judge during the course of the trial were certainly very prejudicial to the rights of the Commission Company in this case. This is not denied by the learned Supreme Court in its opinion. The only ground on which the opinion of the Supreme Court on that branch of the case is based is that the Commission Company did not object and except to the objectionable remarks of the trial judge at the time they were made. It is not denied that the remarks were objectionable and were prejudicial to the Commission Company.

In support of the proposition that a judgment should be reversed where the trial judge indulges in prejudicial remarks, we cite the following:

Rose v. *Kansas City*, 102 S. W., 578;
Wright v. *Richmond*, 21 Mo. App., 76;
Paget v. *Mall*, 159 Mo., 143;
McIntosh v. *McIntosh*, 44 N. W., 592; 79 Mich., 198;
Railway Co. v. *Barlow*, 8 S. W., 147; 86 Tenn., 537.

In the above cited case of *Wright* v. *Richmond*, the court in its opinion said:

"Every one at all familiar with court proceedings knows how easily the average juror takes impressions of the merits of a cause from any manifestation of the judge's opinion of them. It is the first duty of every trial judge, in the presence of the jury, to preserve a strict neutrality, and carefully to abstain from intimating, except through the legitimate channel of its instruc-

tions, his opinion as to which way the verdict ought to go. Any other course must deprive the suit of the most valued privileges pertaining to the right of trial by jury."

Our courts are inclined to be very strict in reference to any matter calculated to influence a jury by means other than their recollection of the evidence. We are aware that there is a difference in this respect between the rule which obtains in the federal courts and that which obtains in the state courts, but the courts of Oklahoma are courts that administer justice under a code the same as the state courts. The territorial courts, like those of Oklahoma, are not federal courts under the constitution, which administer justice according to the English plan of instructing juries, under which a court may give its idea of the facts. In the code states and in territories like Oklahoma, which has a code, such remarks as were made by the learned trial judge in this case, we submit, are improper.

VII.

In this case the Commission Company has, we submit, suffered a great injustice. Although it loaned $57,674.42 to Edmisson, it appears that the aggregate of all the proceeds of sales by the company of Edmisson's cattle mortgaged to secure that debt, including all the cattle received by the company both before and after the contract of November 22, 1899, amount to $50,005.45. This appears from the statement of the company at page 19 of the record. Here is a loss of over $7,000 in the collection of an honest debt. How was this loss brought about? What became of Edmisson's mortgaged cattle? Why did the company send Bryson to Edmisson's ranch early in November, 1899, to ascertain about how many cattle

he had, and why did it make on Bryson's return from that trip, the contract of November 22, 1899, except on the theory that it was dealing with a rogue?

In addition to that loss of $7,000, the Commission Company suffered a considerable loss in the expense incurred by being compelled to send Bryson and Gober to collect the cattle received after that contract, and also in the expense of this suit. Notwithstanding that contract required Edmisson to gather and deliver the cattle, he not only did not perform the contract, but was a hindrance and an obstruction in the collection of the cattle. And now by this suit he seeks to inflict on the company a still greater loss and wrong of from seven to ten thousand dollars more. This suit was brought April 7, 1900 (p. 14, Rec.), before he knew of the number of cattle which he claims Gober received. McFadden, who was his principal witness on this branch of the case saw the Gober cattle in May and July, 1900 (p. 81, Rec.). Indeed there is no testimony on behalf of Edmisson definitely showing how many cattle Gober had collected prior to the bringing of this suit April 7, 1900, or definitely showing that he had collected any of the cattle which he collected prior to that time. This is another reason why the evidence does not support the verdict. As it does not appear that all the cattle or how many of those which he collected were gathered before the bringing of this suit on April 7, 1900, a recovery, therefor cannot be sustained in this action. It is conceded that the cattle gathered by Bryson, whether that number was 1,556 or 1,710, is not in excess of what the company was entitled to under the contract, and that for those cattle he is not entitled to recover. Edmisson in bringing the suit seems to have thought that local influence and prejudice against a foreign live stock commission company would be a

substitute for facts and evidence. If he so reckoned he was not disappointed in the result. The trial was most grievous to the company throughout. The exclusion of its books of account showing the actual number of cattle it had received, coupled with the repeated prejudicial remarks of the judge belittling the testimony of Bryson, Gober and Barclay (pp. 130-137, 147-149, Rec.), and the company's other witnesses, while accepting the testimony of Edmisson and his witnesses as true (p. 130, Rec.), all in the presence of the jury, inflicted an injury on the company serious, burdensome and grievous. It would have made a bad matter much worse if the company's counsel had openly objected and excepted, in the presence of the jury, to each objectionable remark of the Judge when made.

In the recent work of Hirschel on Trial Tactics, p. 56, that author says: "It is never well to argue with the court, because the court always has the advantage. It is not a fair fight and the lawyer and his client will be the sufferers."

While exceptions are requisite where the improper conduct of an attorney, witness or juror is brought before the court, they ought not to be required to bring under review the continued, repeated and prejudicial improper remarks of the presiding Judge.

Sec. 16 of the act creating Oklahoma a state, provides for the removal into, and trial of pending cases of diverse citizenship like this in a federal circuit court of the new state. We beleve that if our assignments of error should be sustained by this court a new trial in such a tribunal free from local influence and prejudice, would be free from injustice and error.

VIII.

We submit that the specifications of errors should be sustained, that the verdict and judgment should be reversed and the cause remanded to the trial court for a new trial.

Respectfully submitted,

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE AND
ODUS G. YOUNG,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1907.

NUMBER 139.

DRUMM-FLATO COMMISSION COMPANY,
PLAINTIFF IN ERROR,

VS.

R. C. EDMISSON,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF OKLAHOMA TERRITORY.

STATEMENT.

Plaintiff in error is a live stock commission company, located at Kansas City, and was defendant in the trial court; and defendant in error is a resident of Oklahoma, engaged in cattle raising, and was plaintiff in the trial court. For convenience the parties will be designated in

this statement and the brief following, as plaintiff and defendant as they were in the trial court.

The parties to this action had been transacting business with each other for several years. From time to time the defendant had loaned money to plaintiff, and plaintiff had given mortgages on his cattle to secure the payment of these loans. From time to time plaintiff shipped cattle to defendant, to be sold by it and the proceeds applied on his notes.

For certain reasons, which are not shown by the evidence because they did not constitute an issue in the case, a contract was entered into between plaintiff and defendant on the 22nd day of November, 1899, by which it was agreed that plaintiff should deliver to defendant nineteen hundred head of cattle, as they ran on the range, of various ages, on which the defendant held a chattel mortgage. provided that number could be found; and that defendant should receive said cattle in full payment of all indebtness which plaintiff owed it. The contract further provided that if plaintiff should gather as many as two hundred head of cattle above the nineteen hundred, he should deliver one hundred of that number to defendant, and the residue of his cattle were to be retained by him free of the lien of the mortgages held by defendant.

This contract was prepared by the President of the defendant Company and was signed at Kansas City by the parties thereto, although plaintiff did not read the same until he had left Kansas City and was on his way home; but there is no claim on the part of either party

that the contract was procured by fraud or false representations or was not fairly entered into by both parties.

Immediately after this contract was entered into plaintiff began to round up his cattle for the purpose of delivering them to the defendant under the terms of the contract, and within a few days thereafter defendant sent an agent, a man named Bryson, to plaintiff's ranch in Oklahoma to receive the cattle. A number of cattle were delivered to defendant's agent, being driven from plaintiff's pasture and counted as they passed through a gate, and thereafter defendant's agent took charge of them. There is a conflict of evidence on the subject, but plaintiff's evidence shows, and the jury found, that 1710 head were thus delivered to defendant.

After the delivery of these cattle plaintiff immediately began to round up other cattle for the purpose of delivering to defendant the number of cattle called for by the contract. It had been agreed between him and defendant's agent, Bryson, that on a certain day, about a week thereafter, said agent would return to plaintiff's ranch for the purpose of receiving the other cattle. In the meantime plaintiff gathered 350 or 400 head of cattle and had them in his pasture ready to deliver to defendant's agent, Bryson, sufficient to complete the terms of the contract; but Bryson did not come to receive them. Instead of Bryson returning to defendant's ranch at the appointed time to receive the cattle which plaintiff had rounded up for the purpose of delivering to him, defendant employed another agent, a man named Gober, who went to plain-

tiff's ranch, in his absence, and drove away the cattle that plaintiff had gathered together to be delivered to defendant. Plaintiff, having returned to his ranch and learned that Gober had driven away the cattle, immediately started after the cattle for the purpose of having the same counted by himself and Gober, but when he overtook Gober and the cattle, Gober refused to permit them to be counted.

Aftrwards Gober, acting as the agent for defendant, gathered other cattle belonging to plaintiff, amounting altogether, as the plaintiff's evidence shows and as the jury found, to 574 head, a number of which he claims to have shipped to defendant at Kansas City, and a number of which defendant sold to him.

Defendant having arbitrarily taken possession of and converted to its own use a large number of cattle in excess of the number called for by the above mentioned contract, that is, two thousand head, plaintiff sued it for the conversion of such excess number of cattle.

The issue in the case was as to whether defendant had taken and converted to its own use more than two thousand head of cattle.

The amount of the indebtedness of plaintiff to defendant at the time the contract was entered into between them is not shown by the evidence, *because that was not an issue in the case.*

Whether defendant had given plaintiff credit for all of the proceeds of all of the cattle that plaintiff had shipped to it, might have been shown by the evidence, but

was not, *because the trial court properly held that that was not an issue in the case.*

THE NUMBER OF CATTLE COVERED BY THE MORTGAGES GIVEN BY PLAINTIFF TO DEFENDANT WAS NOT AN ISSUE IN THE CASE.

What became of all of the cattle covered by the mortgages from plaintiff to defendant—how many of them had perished on the range and how many had been shipped to defendant—was not shown by the evidence, *because that was not an issue in the case.*

THE REFERENCES TO THESE MATTERS BY THE ATTORNEYS FOR THE COMMISSION COMPANY IN THEIR STATEMENT, WERE WHOLLY GRATUITOUS, ABSOLUELY UNCALLED FOR, AND APPARENTLY ILL-ADVISED. THEY SEEM TO HAVE BEEN MADE FOR THE PURPOSE OF TRYING TO PREJUDICE THIS COURT AGAINST THE PLAINTIFF AS TO THE LAW POINTS INVOLVED IN THE CASE.

It is not now, and never has been, conceded that all of the cattle that were counted through the gate and delivered to Bryson, as agent for defendant, were shipped to Kansas City, consigned to defendant, as stated by counsel for defendant.

It is not now, and never has been, conceded that defendant's books show all the cattle that were shipped by Bryson to Kansas City. All statements to that effect in defendant's statement and brief, are incorrect, and not sustained by the evidence in the case.

In their statement the learned attorneys for the defendant, in an effort to show that the verdict of the jury was not correct as to the number of cattle defendant received after the contract was entered into between the

parties, refer to certain parts of the evidence, ignoring other parts thereof, and even refer to the allegations of defendant's answer, as though that constituted proof. Inasmuch as this is an action at law, and there is abundance of substantial evidence to support the verdict, we do not deem it necessary to refer in detail to these matter's contained in the statement of the attorneys for the defendant. However, as they place so much stress on the testimony of Mr. Gober, it may not be amiss to call the attention of the court to the fact that he purchased from defendant what was called the remnant of the Edmisson cattle, and that it was to his interest to have the number of that remnant appear as small as possible; and also to the further fact that when engaged in the (as he pretends) peaceable and lawful occupation of driving plaintiff's cattle away from his ranch, in his absence, he thought necessary to carry a Winchester rifle across his saddle.

Defendant's counsel complain of the ruling of the court in excluding, as they assert, defendant's books purporting to show the number of Edmisson cattle received and sold by defendant in December, 1899. No such ruling was made. The books were not offered in evidence. They offered in evidence what purported to be copies of the books, without accounting in any way whatever for the books themselves. Moreover, they did not, either in their assignment of errors or in their specification of errors, set forth the evidence which they offered, as required by Rules 21 and 35 of this court.

They also complain of the action of the court in giv-

ing instructions numbered 7 and 8, but they have not, either in their assignment of errors or in their specification of errors, set forth said instructions *totidem verbis*, as required by Rules 21 and 35 of this court.

They have devoted considerable space in their statement and brief to the subject of remarks made by the court during the progress of the trial, but they did not make any objection whatever to any of the remarks about which they now complain. They did not save any exception to any of those remarks, nor did they mention or refer to them in any way in their motion for new trial. They made no complaint whatever in regard to them until after the case had reached the Supreme Court of Oklahoma.

Counsel for defendant, in their brief, unmindful of the rules of this court, have referred to plaintiff as a rogue. We will assume that they were not aware of the rule of this court on the subject, but they ought to know the common rules of propriety. The jurors who decided this case did not entertain any such opinion of the plaintiff. The trial judge who heard the evidence and had an opportunity to observe the plaintiff and other witnesses while they were testifying, did not entertain any such opinion. The Supreme Court of Oklahoma, composed of honorable, upright and able men, who carefully considered all of the evidence in this case, did not entertain any such opinion.

BRIEF.

I.

AS TO THE WEIGHT OF THE EVIDENCE.

The rule, thoroughly established by the decisions of this court as well as the decisions of the appellate courts of the various states and territories, is that in an action at law *the appellate court will not consider the question of the weight of evidence.*

Whether the verdict in this case was supported by a preponderance of the evidence in the case, was a question resting solely within the sound discretion of the Judge of the trial court.

Notwithstanding this well settled rule of law, we do not feel disposed to permit the argument of counsel for defendant on this point to go unchallenged.

It appears from the evidence that Mr. Bryson, agent for the Drumm-Flato Commission Company, and his employees, Mr. Black and Mr. Holman, assisted by plaintiff were something like nine days rounding up the Edmisson pasture, or rather a portion of the Edmisson pasture, and as a result of this round-up, they secured 1710 of the Edmisson cattle.

We quote the following from the testimony of Mr. Edmisson, found at pages 56-58 of the printed record.

> Q. Did you round your entire pasture at that time?
> A. No, sir; we rounded—oh, possibly two thirds of it.

Q. What part of the country did you round?
A. The east end and a little of the northwest corner, or rather the north.
Q. State when this round up was made as near as you remember.
A. It was between the 22nd of November and the first of December, 1899.
Q. State how many cattle you rounded up at that time of yours?
A. Seventeen hundred and ten head.
Q. What was done with these seventeen hundred ten head of cattle?
A. I delivered them to Mr. Bryson.
Q. State where they were delivered?
A. We counted them through a gate west of my house three-quarters of a mile.
Q. State who was present at this count?
A. Mr. Bryson, Mr. Black, Mr. Holman, Mr. Brothers, Mr. Edmisson and myself, as well as I recollect.
Q. State what was done with these cattle after they were counted through this gate?
A. Mr. Bryson taken the cattle and moved them off from the fence up on to the flat and held them there, that is, he put them under hold.
Q. About what time of the day was it when you counted them there through that gate, Mr. Edmisson?
A. Well, sir I couldn't say postive about the time, but it was between three o'clock and six o'clock, would be my recollection. It was after dinner sometime.
Q. State how these cattle were counted through the gate, Mr. Edmisson.
A. The cattle were rounded up and counted by Mr. Black, Mr. Bryson and myself, and we had other men back stringing them out, putting a few through at a time. We had a bunch, a bunch kind a back,

and we would drive in a small bunch and drive them through a few at a time, and whenever we got a hundred then we would tally.

Q. State how you tallied this count?

A. I tallied by tallying on a book making a mark. Some tallied by tying a knot in a rope.

Q. Now after these cattle were rounded up and prior to the time you counted them out, state what you did with reference to cleaning the herd of strays?

A. We rounded them up on the school section south of my house and we got all the strays out all the cattle that wasn't in my mark or brand, and cleaned the herd clean, and then we counted them through that gate, and delivered them to Mr. Bryson.

Q. State whether or not Mr. Bryson was present and agreed to the count at that time?

A. Yes, sir; the count seemed to be satisfactory.

Mr. Black an employee of Mr. Bryson, who testified in this case, after stating how the round up was made and what was done with the cattle that was in the little pasture, prior to counting them through the gate, states as follows: (page 98 printed Record.)

Q. State what was done with any stray cattle, if any were gotten into this little pasture?

A. After we got done, we rounded up all the cattle that was in the little pasture, and cut all the strays, leaving only the X-2 and 55 cattle in there.

Q. State if you know how many of Edmisson's cattle were left in that little pasture after cutting out the strays?

A. After we cut out the strays we drove them about a mile to a gate and counted them as they went through this gate, seventeen hundred and ten.

Q. State who actually counted these cattle at that gate?

A. R. C. Edmisson, Jim Bryson and myself.

Q. State if you tallied the cattle as they came through?

A. Yes, sir.

Q. State how many you gentlemen counted before you tallied?

A. One hundred.

Q. What did you do, if anything, when you counted a hundred?

A. Tied a knot in a rope.

Q. State if you three men agreed in your count at that time?

A. We did.

Q. State the number of cattle then agreed upon by you gentlemen in this count, belonging to Mr. Edmisson?

A. We agreed on seventeen hundred and ten head.

Mr. Holman, another employee of Bryson, testifying relative to this count, said: (page 110 printed Record.)

Q. State if you know how many of these cattle were gathered by you and other employees of Mr. Bryson?

A. Seventeen hundred and ten head.

Q. State the kinds of cattle as near as you can. The grade.

A. General mixture. Cows, calves and steers.

Q. State whether or not you or any one counted these cattle after they were gathered?

A. Yes.

Q. State when and where you counted them.

A. Don't know the day of the month, about one mile west of Edmisson's ranch.

Q. State how you counted them?

A. Going through a gate.

Mr. Bryson, the agent of the commission company, denied in his evidence that he ever had a conversation with one A. W. Tolbert, relative to these cattle being counted through the gate from Mr. Edmisson's little pasture into Roberts and Harrington's pasture, but Mr. Tolbert, a disinterested witness at page 237 of the printed record, testified that such conversation occurred.

> Q. State whether or not you had a conversation with Mr. Bryson in the town of Curtis as he was driving the cattle into the stock yards there in which he stated to you that these cattle had been worked and the strays cut out and the cattle counted through the gate out of the Edmisson pasure into the Harrington pasture by the boys?
> A. Yes.

Counsel for plaintiff in error seem to be impressed with the idea that a number of cattle were counted out of this herd of seventeen hundred and ten head, after they were counted into the Roberts and Harrington pasture, and insist that they should be deducted from the seventeen hundred and ten head of the Edmisson cattle counted through the gate, but a careful examination of the record will show that the strays that were cut out of this herd of cattle after they were rounded up in the Roberts and Harrington pasture, were cattle that mixed with those seventeen hundred and ten head of Edmisson cattle after they were counted through the gate and deliverd to Mr. Bryson, and turned loose on the range in the pasture controlled by Roberts and Harrington; and none of the evidence shows that there were any strays

among the seventeen hundred and ten head of Edmisson cattle counted through the gate.

On the contrary the evidence shows that the strays were all cut out of the herd before they were counted through the gate.

It will also be observed that Mr. Holman and Mr. Black have absolutely no interest whatever in the result of this suit. They were men who had been engaged in the cattle business from five to fifteen years, and were employed by Mr. Bryson, agent of the commissi[illegible] company, to assist in gathering this herd of cattle; if they were biased in any way, it would certainly be in favor of their employer, Mr. Bryson, and their testimony corroborates that of Mr. Edmisson in every important particular in this case.

Counsel for defendant also contend that we conceded that all the cattle delivered by Edmisson to J. F. Bryson, agent of the commission company, were shipped from Curtis, Oklahoma, Territory, to Kansas City, Missouri. Now no such concession has ever been made. We de not know, as a matter of fact, whether or not Bryson shipped to Kansas City all the cattle received by him. But we are positive that if he did ship to Kansas City all the cattle which he received from Mr. Edmisson, there was something radically wrong with his alleged count at Curtis, Oklahoma, and also with the alleged count at Kansas City. There was an irreconcilable conflict between the evidence of plaintiff and the evidence of defendant as to the number of cattle delivered by plaintiff

to Bryson, as agent for defendant. It was for the jury and the trial court to determine whether the testimony of the plaintiff or that of the defendant on that subject was true. The jury found that issue for the plaintiff, and the judge of the trial court approved the finding.

In making an attack on the finding of the jury, counsel for defendant say that it is conceded by plaintiff that all of the cattle delivered to Bryson were by him shipped to Kansas City. *We do not think that statement is fair.* We made no such concession. But even if it were conceded, it proves little.

We do not desire to seem harsh or to unnecessarily reflect upon the defendant in this case, but we think it permissible to say that men who would deliberately undertake to repudiate a contract entered into in good faith and at their own suggestion, because they thought they had a technical right to repudiate the same, *would make false representations as to the number of cattle received at Kansas City.*

The evidence in this case shows, almost conclusively, that plaintiff delivered to Bryson 1710 head of cattle, and that Gober, the other agent of the defendant, took possession of 574 head of plaintiff's cattle, making a total of 2284 head, being the number found by the jury to have been received by defendant's agents.

It is said by defendant that when Mr. Bryson was at plaintiff's ranch just prior to the making of the contract of November 22nd, 1899, there were counted on plaintiff's ranch only 2578 head of cattle. In his testi-

mony Bryson deducts from that number 214 head, which he claims were counted twice on him. Deducting these 214 head from the total, leaves 2364 as the total of all of the Edmisson cattle on the ranch at that time.

Bryson further testified that of these 2364 head, 769 head were shipped to Kansas City. That would leave on the ranch only 1563 head of cattle at the time the contract of November 22nd, 1899, was entered into. Notwithstanding this evidence on the part of the defendant, it is conceded by defendant that its agents received 1882 head of Edmisson cattle.

The testimony of Bryson as to 214 head of cattle being counted twice, is too absurd to be entertained for a moment. It is a matter of common knowledge that no man, even though he were familiar with a herd of cattle of the size of the one in question, could identify 214 particular cattle so as to be able to testify truthfully that they had been counted twice. It might be that in a herd of cattle of this size there would be a few peculiarly marked cattle that a person might be able to distinguish, but there is not a living human being who could distinguish 214 head of cattle, as they ran on the range, from other cattle of the same age, breeding, flesh marks and general appearance.

It is also contended that Mr. Bryson counted these cattle as they were driven through the chute into the cars at the stock yards at Curtis, Oklahoma; but it must be borne in mind that these cattle were not assorted in to pens, but that cows, calves, yearlings and two year

olds were loaded into the cars promiscuously, and also that they were driven through the chute into the cars on a dark night, by the aid of a dim lantern. Under these circumstances it would have been practically impossible for Mr. Bryson to have made a correct count of the cattle, even if he had tried to do so. Still, he testified that the exact number loaded was 1556 head.

WE INSIST THAT THE DECIDED WEIGHT OF THE EVIDENCE IN THIS CASE SHOWS THAT PLAINTIFF DELIVERED TO BRYSON 1710 HEAD OF CATTLE, AND THAT GOBER DEFENDANT'S OTHER AGENT, ACTING UNDER AUTHORITY FROM DEFENDANT, TOOK POSSESSION OF AND CONVERTED 574 HEAD OF THE PLAINTIFF'S CATTLE, AND ON THIS POINT WE INVITE THE ATTENTION OF THE COURT TO PAGES 58, 61, 81, 82 AND 102 OF THE PRINTED RECORD.

COUNSEL FOR DEFENDANT CRITICISE THE TESTIMONY OF MR. MCFADDEN, AND WE INSIST THAT THE CRITICISM IS UNJUST.

Mr. McFadden was an experienced cattleman, and he rode through the herd of Edmisson cattle that had been forcibly taken possession of by Gober. His attention was particularly called to them because of the fact that some of the cattle bore some of the same marks that his cattle bore, and he was looking for his own cattle. Another reason why he gave particular attention to the number, was that he desired to put his cattle on the same range, and it was a question in his mind whether the range was sufficient to support his cattle and this herd in possession of Gober. Moreover, another gentleman of whom he had made some inquiry in regard to the cattle, had expressed the opinion that there were 575 head in the herd, and after riding through the herd and mak-

ing an estimate of the number, Mr. McFadden came to the conclusion that the estimate of the other gentleman was correct, that is, that the herd contained about 575 head of cattle. (Printed record, pp. 81 to 86.)

They also criticise the testimony of Mr. Black, which criticism is alike unjust.

Mr. Black had been working with these cattle. He had helped cut them out of the Tom Govier pasture and throw them into this other pasture. He estimated the number at seven or eight hundred head; and while he said that was a guess on his part, that fact does not destroy the probative force of his testimony. If he had fixed the exact number and testified positively in regard thereto, the probability is that the jury would not have believed him, and ought not to have done so.

It was entirely proper that these witnesses should express their opinions as to the number of cattle in the herd in controversy.

> 2 Bishop's New Criminal Procedure, Sec. 677;
> *Curtis* v. *Ry. Co.*, 18 Wis., 312;
> *State* v. *Reitz*, 83 N. C., 634.

In the Reitz case the court said:

> "The bare opinion of the witness as to the identity of the tracks should have no weight with the jury, but when the witness gives his reason for entertaining the opinion, the whole of the testimony should be allowed to go to the jury for them to say whether the grounds of the opinion are reasonable and satisfactory."

In the case Mr. McFadden gave his reasons, as above stated, for the opinion he entertained, and stated how

and why he arrived at such opinion. (Record, pp. 81, 85 and 86.)

He also testified that he was present at a round up of this same herd of cattle in the month of June, 1900, and worked with them all day. (Record, pp. 81 and 82.)

Mr. Black, as above stated, gave the reason for the opinion which he expressed in regard to the number of cattle, and how and why he arrived at that opinion. To use his expression, he had just worked them a few days before, and helped throw them from one pasture into another. (Record, p. 102.)

WE ASSERT, WITHOUT HESITATION AND WITH THE UTMOST CONFIDENCE, NOT ONLY THAT THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT, BUT ALSO THAT IT WAS SUPPORTED BY THE VERY DECIDED WEIGHT OF ALL THE EVIDENCE IN THE CASE.

II.

THE COURT COMMITTED NO ERROR IN EXCLUDING THE TESTIMONY TENDING TO SHOW WHAT DEFENDANT'S BOOKS SHOWED AS TO THE NUMBER OF CATTLE SHIPPED TO DEFENDANT AS EDMISSON CATTLE IN THE MONTH OF DECEMBER, 1899.

1. The books of the defendant would not have been competent evidence on this subject, for the reason that the entries therein did not pertain to a transaction between plaintiff and defendant. Plaintiff delivered the cattle in question to defendant's agent in Oklahoma, and any entry made in defendant's books thereafter could not be binding on plaintiff. Such entry would pertain solely to a transaction between defendant and its own agent,

and not between plaintiff and defendant, and consequently plaintiff ought not to be bound thereby.

2. The entries in defendant's books were not made cotemporaneously with the transactions to which they related, nor by any person who had any knowledge of those transactions, and consequently were not admissible in evidence.

Bahre v. *Simpson*, 4 Ala., 312;
Davis v. *Taylor*, 65 Ala., 102;
Walling v. *Morgan*, 126 Ala., 326;
Conn. M. I. Co. v. *Swenk*, 94 U. S., 598;
Wells v. *Hobson*, 91 Mo. App., 379;
Nelson v. *Nelson*, 90 Mo., 460;
Robinson v. *Smith*, 111 Mo., 205;
2 Wigmore on Evidence, Sec. 1530.

3. Even if the books themselves would have been competent evidence, the testimony of defendant's witness as to the contents of the books, was not competent.

There is no rule of law better settled than that secondary evidence will not be admitted except in a case where the original evidence cannot be produced. There was not a particle of evidence in this case tending to show that the books of the defendant purporting to show the number of cattle received and sold, were not in possession of defendant and could not have been produced at the trial of the case. Plaintiff had a right to have these books produced, in order that the jury might see the entries therein, and how they were made and when they were made. In fact, defendant's witness who testified to the copies of the books in question, admitted on

cross examination that he had already testified that these same books showed a different state of facts from what he testified was shown when his deposition was taken in this case.

Defendant is in no position to make complaint in this court as to the ruling of the trial court in excluding evidence as to the contents of its books.

Rule 35 provides that "when the error alleged is to the admission or rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected".

That rule was not complied with in this case.

Rule 21 provides that when the error alleged is to the admission or rejection of evidence, the specification of errors "shall quote the full substance of the evidence admitted or rejected".

This rule was not complied with.

III.

THE TRIAL COURT COMMITTED NO ERROR IN ITS INSTRUCTIONS ON THE QUESTION OF INTEREST.

The provisions of the statute of Oklahoma (par. 32, Sec. 2752, page 632, Wilson's Revised and Annotated Statutes of 1903), constitute a good and sufficient answer to defendant's argument on this point.

Said statute reads as follows:

> "The detriment caused by the wrongful conversion of personal property is presumed to be, first; The value of the property at the time of the conversion, with interest from that time; or, second,

> where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversation and the verdict, without interest, at the option of the injured party; and third, a fair compensation for the time and money properly expended in pursuit of the property".

Sec 1, of Chap. 18, of the Laws of Oklahoma, adopted in 1897, contains the following provisions:

> "Under an obligation to pay interest, no rate being specified, interest is payable at the rate of 7 per cent per annum, and in like proportion for a longer or shorter time; but, in the computation of interest for less than a year, 365 days are deemed to constitute a year."

On this point we also desire to call the attention of the court to the following cases:

> *Com. Co.* v. *McKinster,* 10 Okla., 708;
> *Straw* v. *Jenks,* 43 N. W. Rep., 491;
> *Thompson* v. *Schaetzel,* 42 N. W., Rep., 765.

Under these two sections of the statutes of Oklahoma, and these decisions of the Supreme Court of Oklahoma and the Supreme Court of Nebraska, the latter construing a statute similar to that of Oklahoma, we do not see how defendant's counsel can seriously contend that the court committed any error in giving instructions on the question of interest.

The section of the statute referred to in the brief of counsel for defendant is a general statute on the subject of damages, while the statute which we have quoted applies specifically to a case of the wrongful conversion

of personal property; and we understand the rule to be that where there is a conflict or inconsistency in the provisions of a general and a special statute, *the provisions of the special statute will control, where they apply to the case under consideration.*

Moreover, the defendant has not, either in its assignment of errors or in its brief, set forth *totidem verbis,* as required by the rules of this court, the instructions about which they complain.

Rule 35 provides that "when the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to, *totidem verbis,* whether it be an instruction given or an instruction refused."

The Act of Congress organizing Oklahoma Territory contains the following provision:

> "Writs of error and appeals from the final decisions of said Supreme Court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy, to be ascertained by oath or affirmation of either party or other competent witness, shall exceed $5,000."

Considering these rules and this provision of the Organic Act, defendant could not ask this court to reverse the judgment in this case on account of the instructions in question, even if it were conceded that there was any error in said instructions.

IV.

THE COURT COMMITTED NO ERROR IN REFUSING TO RESUBMIT TO THE JURY INTERROGATORY NO. 5.

Said interrogatory was, "How many Edmisson cattle did J. F. Bryson ship from Curtis to Kansas City?".

1. Said interrogatory was not material to the issue in this case. The contract of November 22nd, 1899, provided that Edmisson should deliver to defendant a certain number of cattle, *as they ran on the range,* and it was not provided in the contract that these cattle were to be delivered at Kansas City.

Other interrogatories submitted to the jury and the answers of the jury to the same, were as follows:

"Q. 1. After November 22nd, 1899, how many cattle did the Drumm-Flato Commission Company receive in the Edmisson brand?

A. 2284 head of cattle.

Q. 3. Who gathered the Edmisson cattle gathered after November 22nd, 1899?

A. Edmisson, Bryson and Gober.

Q. 4. Did plaintiff, Edmisson, gather and deliver to the Drumm-Flato Commission Company or its agents any cattle after November, 1899? If so, how many?

A. Yes, helped gather and deliver 1710 head of cattle.

Q. 6. How many Edmisson cattle did J. R. Gober gather?

A. 574 head of cattle".

It will be seen that these other interrogatories submitted to the jury every material matter involved in the issues in this case, and they were fully and fairly answered by the jury.

When plaintiff delivered the cattle to defendant's agents, he fully performed the contract on his part, and it was entirely immaterial what defendant's agents did with the cattle. Hence, interrogatory No. 5 was wholly irrelevant to the real issue in the case.

Counsel for defendant contend that plaintiff was under obligations to deliver the cattle at Kansas City because the chattel mortgages contained a provision to the effect that the cattle, when marketed, should be consigned to defendant at Kansas City. This provision was simply for the purpose of enabling defendant to collect a commission for selling the cattle; and, moreover, *all of the provisions of the chattel mortgages were superceded by the contract of November 22nd,* 1899.

Defendant's construction of said contract shows that plaintiff was not required to deliver the cattle in Kansas City. After the contract was made defendant sent to Oklahoma its agent, Bryson, to receive the cattle, and Bryson did receive 1710 head when they were driven through the gate of plaintiff's pasture. Thereafter Bryson assumed full control of them. The larger portion of the other cattle taken possession of by Gober, were not shipped to Kansas City at all. They were kept on the range and finally sold to Gober.

In the case of *Lawton* v. *McAdams,* 83 Pac. Rep., 429, the Supreme Court of Oklahoma says:

> "The object of the statute is to elicit material facts, and not mere fragments or items of evidence. Hence, interrogatories that are calculated to mislead, confuse or harrass the jury, should not be submitted."

2. The wording of said interrogatory was not clear and concise and of such nature that, even if it could have been intelligently answered by the jury, the answer would have thrown any light on the issue in the case.

It is an uncontroverted fact that prior to the making of the contract of November 22nd, 1899, Bryson shipped from Curtis to Kansas City a large number of Edmisson cattle. (Record, p. 231-232.) And under the language of said interrogatory, the jury would be required to state, if they could, the number of these cattle, as well as the number of cattle shipped after the contract was made, while it must be conceded that the number of cattle shipped prior to November 22nd, 1899, was absolutely immaterial.

In the case of *City of Guthrie* v. *Shaffer,* 54 Pac. Rep., 698 (fifth syllabus), the Supreme Court of Oklahoma said:

> "A special interrogatory requesting that the jury state the condition of the street crossing at the place of the alleged accident on June 19th, 1895, is not a proper interrogatory to submit to the jury. Where a special question of fact is submitted to a jury, the wording of the interrogatory should be clear and concise, and of such a form that they can give a direct answer thereto."

In discussing the case Judge Burwell, who delivered the opinion of the court, used the following language:

> "It is also contended that the court erred in not giving special interrogatory No. 4, which is as follows: 'State the condition of the street crossing at

the place of the alleged accident on June 19th, 1895'. We fail to see any error in this refusal. The question asked to be submitted was too general and called for a stateemnt of the condition of the crossing. By this question, the jury probably would have thought that they were called upon to tell all about the crossing, as to the length, width, height above street, whether old or new, whether safe or unsafe, whether defects in same, if any, could be seen at a distance, etc. The question was not in proper form. 'Each special interrogatory submitted to the jury should be so framed as to present distinctly a single material fact involved in the issues of the case'. *Railroad Co.* v. *Aderhold* (*Kans. Sup.*), 49 Pac., 83. Where a special question of fact is submitted to a jury, the wording of the interrogatory should be clear and concise and in such a form that they can give a direct answer thereto."

Under this decision, which is controlling authority on the subject, we insist that said interrogatory No. 5 was too general and ought not to have been submitted to the jury.

3. The Court committed no error in refusing to resubmit said interrogatory to the jury, for the reason that the answer which the jury gave thereto, that is, that the evidence was not sufficient to enable them to state the number of cattle, was the only answer which the jurors could conscientiously make. The evidence in the case shows that no count of the cattle was made at the time they were loaded into the cars at Curtis; and also shows conclusively that even if an attempt had been made to make a count of the cattle at that time, it was impracticable to do so.

V.

AS TO REMARKS OF THE TRIAL COURT.

For several reasons defendant cannot ask this court to reverse the judgment because of any remarks made by the judge of the trial court during the trial of the case.

1. An examination of the record in the case will show conclusively that the trial court made no remarks which were out of place or prejudicial to the defendant. Every remark about which defendant complains must be read in connection with what preceded and followed it, and when thus read, it will readily be seen that the remark was entirely proper.

2. No objection whatever was made to any of the remarks about which defendant's counsel now complain. If, at the time the remarks were made, they considered them improper, they would doubtless have made objections; and if they had made objections, and the remarks were improper, the trial court would have had an opportunity to make a correction at that time.

THE WELL SETTLED PRINCIPLE OF LAW IS THAT OBJECTION MUST BE MADE TO ANY ACTION OF THE TRIAL COURT AT THE TIME IT OCCURS, AND IF NOT THEN MADE, IT CANNOT BE MADE IN THE APPELLATE COURT.

At page 272, Vol. 8, Ency. of Pleading and Practice, the rule is stated as follows:

> "Objection to the conduct of the trial judge or the remarks made by him during the course of the trial, cannot be raised for the first time on appeal. An objection should be made at the time and excep-

tion saved to the ruling; and in some jurisdictions the objection must be renewed in a motion for a new trial."

In support of this proposition we also call the attention of the court to the following cases:

Sloan v. *Frye*, 36 Mo. App., 523;
People v. *Abbott*, 101 Cal., 645;
Straw v. *Pugsley*, 75 Iowa, 742;
Glenny v. *Territory*, 76 Pac. Rep., 754;
Plain v. *State*, 34 Texas Crim. Rep., 448;
Irvin v. *Kutruff*, 152 Pa. St., 615;
Roten v. *State*, 31 Fla., 521.

3. No exceptions whatever were saved to any remark made by the judge of the trial court; and that being true, the defendant cannot ask this court to review the action of the trial court in making any of the remarks complained about.

See authorities above cited.

4. In its motion for new trial no mention is made of any remarks made by the judge of the trial court. If counsel for defendant entertained the opinion that the trial court had committed any error in making any of the remarks about which they now complain, it was their duty to call the attention of the trial court to such remarks in their motion for a new trial. Not having done so, they cannot now ask this court to consider any such objections.

Not having made any objections at the time that the remarks were made, not having saved any exceptions thereto, not having called the attention of the court there-

to in their motion for new trial, it seems that these objections, urged for the first time in the appellate court, are the result of an afterthought.

VI.

AS TO THE OPINION OF THE SUPREME COURT OF OKLAHOMA.

That the losing party should criticise the opinion of the court is to be expected in any case.

Time out of mind it has been the privilege of the losing party to adjourn to the tavern and "cuss" the court.

But seriously we insist that the criticism of the opinion of the Supreme Court of Oklahoma in this case is unwarranted.

1. The reference to the opinion of Chief Justice Burford, on the first appeal of the case, was entirely proper. While it is true that on the first appeal only plaintiff's evidence was before the court for consideration, still on this appeal the entire evidence in the case fully established what plaintiff's evidence on the first appeal tended to prove.

2. The question as to where, under the terms of the contract of November 22d, 1899, the cattle were to be delivered by plaintiff to defendant, has been discussed in another part of this brief.

3. The statement in the opinion of the court in regard to defendant's attempt to introduce in evidence

what purported to be copies of its books, instead of the books themselves, is absolutely true. The copies offered in evidence may or may not have been correct. That is not the question. The rule is that the best evidence shall be produced, and the books themselves were the best evidence. The books were the property of the defendant and in its possession, and it could very easily have produced them at the trial of this case. Not having done so, they ought not now to criticise the Supreme Court of Oklahoma for adhering to a rule of law so old and so well established that no lawyer ought to make any mistake in regard to it.

VII.

AS TO GENERAL REMARKS OF COUNSEL FOR DEFENDANT.

1. The contention of counsel for defendant that there is no definite showing that Gober took possession of the Edmisson cattle prior to the date of the institution of this suit, April 7th, 1900, is not correct.

The testimony of Edmisson is to the effect that Gober came to his ranch and drove away all of his cattle in December, 1899, and January, 1900 (Record, p. 60), and the testimony of Gober is to the same effect (Record, p. 128).

2. Defendant was not entitled to have the Supreme Court of Oklahoma consider the question of the evidence in the case, and is not entitled to have this court do so. Feeling confident that the evidence fully war-

ranted the verdict, we made no objection, in the Supreme Court of Oklahoma, to a consideration on that point, although we might have done so.

In the case of *Sawyer Lumber Co.* v. *Champlain Lumber Co.*, 84 Pac. Rep., 1093, the Supreme Court of Oklahoma said:

> "There is a certificate of counsel that the case contains all the evidence, and also a certificate of the stenographer that his transcript contains all the evidence; but neither of these certificates are authorized or recognized. The case itself must contain the positive averment, by way of recital or other equivalent showing, that it does contain all the evidence submitted or introduced on the trial of the cause, and in the absence of such recital, this court will not review any question depending upon the facts for its determination."

To the same effect is the decision in the case of *McClennan* v. *Minor*, 91 Pac. Rep., 863.

By reference to the record it will be seen that the case made contains no statement to the effect that all of the evidence is set forth, and that being true, under the decisions above referred to the defendant is in no position to ask this court to review any question of fact in the case.

3. The suggestion of counsel for defendant that the case be reversed because it would then be tried in a different court, would, if adopted, result in the reversal of every case pending on appeal or writ of error, from

the Supreme Court of Oklahoma; and the argument could be made in any case with as much force and propriety as in this case. That suggestion seems to us to be entitled to no further consideration or comment.

Respectfully submitted,

ELIJAH ROBINSON,
CHARLES SWINDALL,
Attorneys for Defendant in Error.

Office Supreme Court
FEB 3
JAMES H. McK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1907.

NUMBER 139.

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PLAINTIFF IN ERROR,

VS.

R. C. EDMISSON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF OKLAHOMA.

SUGGESTIONS AS TO ADDITIONAL AUTHORITY CITED BY PLAINTIFF IN ERROR.

ELIJAH ROBINSON.
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If it be permissible, under the rules and practice of this court, for either party to file any additional brief or suggestions at this time, I desire to call the attention of the court to the distinction between the case of *Fant* v. *Campbell*, 8 Oklahoma, p. 586, and the case at bar.

1. In the *Fant-Campbell* case the plaintiff offered in evidence a transcript of the books of Fish & Keck attached to the deposition of a witness, and shown by said deposition to be a correct transcript of the entries in the books of said firm. *The plaintiff had no control over these books,* and, inasmuch as they were located beyond the jurisdiction of the court, *he could not, by any process, compel Fish & Keck to produce them in court.* For that reason the Supreme Court of Oklahoma held that the transcript should have been admitted in evidence. In the case at bar plaintiff offered a transcript of *its own books,* and *offered no excuse whatever for not producing them in court.* It necessarily follows that the ruling of the court in the Fant-Campbell case and the reasons assigned therefor, do not apply to the case at bar.

2. In the Fant-Campbell case the defendants claimed to have paid different sums of money to Fish & Keck, as agents for the plaintiff, to be applied upon the note in controversy. The books of Fish & Keck, a transcript of which was offered in evidence, contained entries showing the amounts which had been paid by defendants to said firm—that is, *showing transactions had directly between defendants and Fish & Keck, thus making the books admissible.* In the case at bar, the book, a transcript of which was offered in evidence, *was not a book of accounts and did not purport to show any transactions between defendant and plaintiff, but simply transactions between plaintiff and its own agent.*

The evidence shows conclusively that the agreement between plaintiff and defendant was that defendant was to deliver to plaintiff the cattle *on the range,* and also shows *that they were delivered by defendant to plaintiff's agent on the range* and he there took charge of them, and defendant had nothing more to do with them, and *ought not to be bound by any entry which plaintiff thereafter made in its books.*

3. Moreover, the question as to the admissibility of this evidence is a matter of general and not of local law, and the decision of the Supreme Court of Oklahoma, even if it were applicable to the facts of the case at bar, would not be controlling authority.

Respectfully submitted,

ELIJAH ROBINSON.
Attorney for Defendant in Error.

DRUMM-FLATO COMMISSION COMPANY *v.* EDMISSON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 139. Submitted January 27, 1908.—Decided February 24, 1908.

In this case this court finds that the evidence was so far conflicting as to remove the verdict of the jury from reversal by an appellate tribunal.

Under par. 4277, § 399 of the Code of Civil Procedure of Oklahoma of 1893, the original books of entry must be produced on the trial; their production before the notary taking the deposition of the witness who kept the books is not sufficient, and copies made by the notary cannot be used where the objecting party gives notice that the production of the books themselves will be insisted upon.

While there may be a general rule that in actions for tort an allowance for interest is not an absolute right, under par. 2640, § 23 of the Oklahoma Code of 1893, the detriment caused by, and recoverable for, the wrongful

conversion of personal property is the value of the property at the time of the conversion with interest from that time.

Where the local statute provides, as does par. 4176, § 298 of the Oklahoma Code of 1893, that on request the court may direct the jury to find upon particular questions of fact, the verdict will not be set aside because the jury fails to answer an interrogatory improvidently submitted in regard to a fact which was only incidental to the issue.

Objections to remarks of the trial court which counsel consider prejudicial must be taken at the time so that if the court does not then correct what is misleading its action is subject to review.

87 Pac. Rep. 311, affirmed.

THE facts are stated in the opinion.

Mr. James S. Botsford, with whom *Mr. Buckner F. Deatherage* and *Mr. Odus G. Young* were on the brief, for plaintiff in error.

Mr. Elijah Robinson and *Mr. Charles Swindall* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action brought by defendant in error against plaintiff in error for $8,000, for the conversion of 410 head of cattle. The case was tried to a jury, which returned a verdict for the sum of $7,436.06. The jury also returned with the general verdict answers to special interrogatories which were submitted at the request of the Commission Company. Judgment was entered upon the verdict, which was affirmed by the Supreme Court of the Territory of Oklahoma. This writ of error was then sued out.

The assignments of error assail the sufficiency of the evidence to justify the verdict and judgment and certain rulings of the trial court.

1. As to the sufficiency of the evidence to justify the verdict, we may say that we agree with the courts below. Upon the questions of fact presented the evidence was so far conflicting as to remove the verdict of the jury and the action of the lower courts from reversal by an appellate tribunal. The

issue between the parties was clearly defined. Edmisson had become indebted to the Commission Company in large amounts of money, secured by certain notes and chattel mortgages on the cattle which are the subject of the action.

In full satisfaction of the indebtedness the company and he entered into an agreement on November 22, 1899,[1] by which he agreed to deliver to the company 1,900 of the cattle as they run on the range, if that number could be found, of various ages. And it was further agreed that if, after the delivery of that number, Edmisson should gather as many as 200 head he should turn over 100 of them to the company, or if he delivered as many as 2,000 head, "any residue thereafter" was "to be retained by said Edmisson." Edmisson contended that he delivered 1,700 head in compliance with this agreement and was ready and had "rounded up" about 350 head of other cattle and held them for a time ready to deliver to the company. These cattle, after being held for a time, were turned

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[1] This agreement, made and entered into this 22d day of November, 1899, by and between Drumm-Flato Commission Company, party of the first part, and R. C. Edmisson, party of the second part.

Witnesseth, That said R. C. Edmisson, the second party, hereby agrees to deliver to Drumm-Flato Commission Company nineteen hundred (1,900) head of cattle as they run on the range (provided the same can be found to make this number of head) of various ages, and on which said Drumm-Flato Commission Company hold a chattel mortgage.

The parties of the first part agree, in consideration of the delivery of the above-mentioned number of cattle, to deliver to said second party, R. C. Edmisson, all of his notes, mortgages and other indebtedness due said Drumm-Flato Commission Company to this date.

It is further agreed by the parties mentioned that if Mr. Edmisson gathers as many as 200 head after the delivery to Drumm-Flato Commission Company of said nineteen hundred head of cattle, he is to turn over 100 head of the 200 gathered, or in case said Edmisson delivers to said Drumm-Flato Commission Company as many as two thousand head of cattle, any residue thereafter is to be retained by said Edmisson.

In witness whereof, we have hereunto set our hands the day and year above written.

R. C. Edmisson,
Drumm-Flato Com. Co.,
Per A. Drumm, P't.

loose in a larger pasture. And Edmisson further contended that the company, by its agents, forcibly took from his ranges and pastures in excess of the number the company was entitled to under the agreement, and for this conversion the action was brought. Edmisson's evidence was addressed to the proof of these contentions.

The counter contentions of the Commission Company were that Edmisson delivered to it only 1,550 head of cattle, and that he refused to deliver any more, and, instead of delivering enough more to comply with his agreement, he scattered them through the various pastures in bunches at distances of forty or fifty miles from his range and it was with difficulty that the company, through its agents, collected 356 head, making in all 1,881 head. In support of these contentions evidence was adduced and the jury rendered the verdict already mentioned.

2. The next assignment of error is that the court erred in rejecting the books of account kept by the Commission Company, showing the number of cattle received and sold by the company. In support of the contention involved in this assignment of error the Commission Company relies on par. 4277 of the statutes of Oklahoma of 1893 and the case of *Kesler* v. *Cheadle*, 12 Oklahoma, 489, and *Drumm-Flato Commission Company* v. *Gerlach Bank*, 81 S. W. Rep. 503.

Par. 4277, § 399, is as follows: "Entries in books of account may be admitted in evidence when it is made to appear by the oath of the person who made the entries, that such entries are correct, and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of the person who made the entries, in case of his death or absence from the county."

To the contention the Supreme Court of the Territory replied that the entries were not part of the *res gestæ*, that besides the books were not produced, and that neither they nor the original entries were attached to the deposition of the witness, nor were they shown to be lost or destroyed. "We

know of no rule of evidence," the court said, "that would permit a witness to state the entries or the contents of a book of account unless the book were lost or destroyed."

It is, however, contended that the books were before the notary public who took the deposition of the bookkeeper, and that copies of the entries were made by the notary. But when the copies were offered as evidence they were immediately objected to as incompetent and immaterial and not the best evidence. The Commission Company was therefore put upon notice that the production of the books themselves would be insisted on. The notary was not trying the case, and before the court and jury who were trying it the objections to the copies of the entries were renewed. We think that the books should have been produced. They were intended as independent evidence—independent of the witness from whose returns they were made. But if it should be granted their exclusion was error, it is difficult to see how the Commission Company was prejudiced. The persons who received the cattle at the place they were delivered to the company, and the employé of the company who sold them after they were received and from whose report the books were made up, all were permitted to testify. And it may be that the entries in the books were inadmissible for the other reasons given by the Supreme Court. They were not entries of any transaction relating to the cattle between the Commission Company and Edmisson. They were entries of sales made by the Commission Company after the cattle had been delivered to its agent and shipped to it by that agent.

3. Error is assigned upon the instruction of the court that if the jury found a conversion of the property seven per cent interest should be added to its value from the time of its conversion. The contention is that interest can only be given in actions by a creditor against a debtor, and that par. 2615, § 7 of the Oklahoma statutes of 1893 controls. That section reads as follows:

"In an action for the breach of an obligation not arising from

contract, and in every case of oppression, fraud or malice, interest may be given in the discretion of the jury."

The Supreme Court of the Territory rejected the contention, deciding that par. 2640, § 23, governed the case. It provides as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: First. The value of the property at the time of the conversion, with interest from that time." There was no error in this ruling. It may be that in the absence of statute the general rule is that in actions for tort the allowance of interest is not an absolute right; *Lincoln* v. *Claflin*, 7 Wall. 132; *The Scotland*, 118 U. S. 507; *District of Columbia* v. *Robinson*, 180 U. S. 92; *Frazer* v. *Bigelow Carpet Co.*, 141 Massachusetts, 126; but the Oklahoma statute has made interest a part of the detriment caused by the conversion of personal property. Other States have done the same.

4. The next assignment of error is based upon the refusal of the court to require an answer to interrogatory number 5, as to the number of Edmisson's cattle the agent of the Commission Company shipped from Curtis to Kansas City.

To establish error in the refusal of the court plaintiffs in error cite par. 4176, § 298, of the Civil Code of the Territory, which provides that in all cases the jury shall render a general verdict, and the court shall in any case, at "the request of the parties thereto, or either of them, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same."

It certainly cannot be contended that the statute requires every interrogatory to be answered, however remote the fact it inquires about may be from the issue. The Supreme Court of the Territory pointed out that the fact inquired into was only incidental to the issue, and was besides undefined and uncertain as to time. The number of cattle shipped might have some bearing or relation of proof to the number delivered, which was the issue in the case, but under the circumstances and conditions of the other proofs it was within the discretion

of the court to decide whether a specific answer should or should not have been required. Indeed, the interrogatory seems to have been improvidently submitted, for the Supreme Court, in its opinion, says:

"The evidence disclosed that a large number of Edmisson cattle had been shipped to Kansas City, in various shipments. Bryson testifies that the total number of cattle shipped was 2,578. There was no dispute on the part of the plaintiff as to the number of cattle that were shipped. The entire controversy was as to the number of cattle that were delivered by the plaintiff to the agent of the defendant, and the number converted after allowing the defendant all that it was entitled to under and pursuant to the contract."

5. Plaintiffs in error finally complain as ground of error of certain remarks by the court which, it is contended, were prejudicial. The Supreme Court replied to this assignment of error that no objection had been taken to the remarks complained of. Counsel now say that to have made objection would have made "a bad matter much worse." But we cannot accept the excuse. We have examined the remarks complained of, and we do not think they had the misleading strength that is attributed to them. At any rate, it was the duty of counsel to object to them, and if then the court made matters worse, or did not correct what was misleading or prejudicial, its action would be subject to review.

Judgment affirmed.